In the Supreme Court of the United States.

OCTOBER TERM, 1898.

MARCUS A. SPURR, PETITIONER,
v.
THE UNITED STATES. } No. 448.

BRIEF AND ARGUMENT FOR THE UNITED STATES.

Three indictments were found against the defendant, Marcus A. Spurr, in the the circuit court of the United States for the middle district of Tennessee.

The indictments were for violation of section 5208 of the Revised Statutes. That section provides:

> It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check.

By section 13 of the act of Congress approved July 12, 1882, it is provided:

> That any officer, clerk, or agent of any national banking association who shall willfully violate the

> provisions of an act entitled "An act in reference to certifying checks by national banks," approved March 3, 1869 (being section 5208 of the Revised Statutes of the United States), or shall resort to any device or receive any fictitious obligation, direct or collateral, in order to avoid the provisions thereof, or who shall certify checks before the amount shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor and shall, on conviction thereof in any circuit or district court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court.

Under this statute the defendant was indicted for willfully, unlawfully, and knowingly certifying as president of the Commercial National Bank of Nashville, Tennessee, certain checks drawn upon that bank by Dobbins & Dazey, he well knowing that said Dobbins & Dazey did not have on deposit with the bank at the times when the checks were certified, respectively, an amount of money equal to the amount specified in said checks, respectively.

The Commercial National Bank of Nashville, Tennessee, was organized in 1884. The defendant, Marcus A. Spurr, was president, and one F. Porterfield was cashier from its organization to the time of its failure, on March 25, 1893. The original capital stock was $200,000, and the capital stock at no time exceeded $500,000.

The firm of Dobbins & Dazey were engaged in the purchase, sale, and exportation of cotton. Its financial standing and credit was of the very best; but its assets

consisted only of money, choses in action, and cotton on hand and in transit.

The three indictments against the defendant, each containing several counts, were consolidated and tried together.

They covered four checks of different dates, all drawn by Dobbins & Dazey on the Commercial National Bank; and they were all dated and certified between December 9, 1892, and February 13, 1893.

Said checks were as follows:

One dated December 9, 1892, for	$15,000.00
One dated December 17, 1892, for	31,000.00
One dated January 3, 1893, for	40,000.00
One dated February 13, 1893, for	9,641.95

In addition to the above checks, covered by the indictments, the defendant certified the two following checks, not covered by the indictments, viz:

One dated January 24, 1893, for	3,000.00
One dated January 24, 1893, for	11,724,89
Total	110,366.84

In short, the defendant, as president of said bank, between December 9, 1892, and February 13, 1893 (a period of sixty-six days), certified checks of Dobbins & Dazey upon said bank amounting to $110,366.54.

These checks of Dobbins & Dazey certified by the defendant during a period of only sixty-six days aggregated more than one-fifth of the entire capital stock of the bank, and, as will be seen further on, there was at no time during that period money on deposit by Dobbins & Dazey to pay them.

It was admitted by defendant on cross-examination that he could not recollect that he had ever certified a check for anyone except Dobbins & Dazey for as much as $10,000. And upon examining the ledgers, which were placed before him, and which contained the certified check account, as kept by said bank from July 11, 1890, to the failure of the bank in 1893, the largest certified check that he could find in said account was for $9,198.63.

With but one exception every check of Dobbins & Dazey, certified by the defendant, was larger than the largest check of any other person that had been certified by the bank during the entire period from July 11, 1890, to the failure of the bank in March, 1893.

The evidence in this case shows that at the time Dobbins & Dazey placed their account with the Commercial National Bank in October, 1891, it was understood by the executive committee and by the defendant, who was a member of said committee, that the business of Dobbins & Dazey was one of great magnitude.

The defendant objected to taking the account, because he thought that owing to its magnitude and the course of business of Dobbins & Dazey the bank might not always be able to provide sufficient cash funds, without inconvenience, to carry the account. R. H. Dudley, another member of the committee, objected to the account upon the same ground and also on the ground that he (Dudley), having been in the cotton business himself, believed that Dobbins & Dazey would be likely to overdraw their account. And when the account of Dobbins & Dazey

was finally taken by the bank, the cashier was directed by the committee, in the presence of defendant, not to allow them to overdraw their account nor to borrow more than their line of credit, and not to discount their drafts without bills of lading attached; and the cashier promised to comply with their directions.

Soon after the account of Dobbins & Dazey was taken by the bank the defendant inquired of Porterfield as to how Dobbins & Dazey was getting along; and in response to the inquiry Porterfield told him that the account had been overdrawn, but that it had been made good.

There was evidence given at the trial that during the entire period covered by the dates of the above-mentioned six checks, that were certified by the defendant, the account of Dobbins & Dazey in said bank was continuously and largely overdrawn upon the individual ledger, with the exception of one day in January, 1893, when there was a small credit balance; that the overdrafts or debit balances on each day were shown upon the individual ledger in red ink, and credit balances in black ink; that said overdrafts varied largely in amount, running from $4,495.90 to $122,593.29; that on the several days upon which the above-mentioned checks were certified by the defendant the account of Dobbins & Dazey was overdrawn in said bank on the individual ledger; and that they, the said Dobbins & Dazey, had no funds or moneys on deposit in said bank with which to meet the checks.

The state of the account of Dobbins & Dazey on the dates of the said several certifications by defendant, and on preceding and succeeding days, as appeared by the

individual ledger of the bank, were shown to be as follows:

Overdraw at close of business December 8, 1892	$114,194.01
Deposited December 9, 1892	50,153.30
Checked out December 9, 1892	377.26
Overdrawn at close of business December 9, 1892	64,417.97
(CHECK OF DOBBINS & DAZEY, DATED DECEMBER 9, 1892, CERTIFIED BY DEFENDANT FOR $15,000.)	
Deposited December 10, 1892	13,972.00
Checked out December 10, 1892	42,407.48
Overdrawn at close of business December 10, 1892	92,853.45
Overdrawn at close of business December 16, 1892	19,503.74
Deposited December 17, 1892, *nothing.*	
Checked out December 17, 1892	31,568.91
Overdrawn at close of business December 17, 1892	51,072.65
(CHECK OF DOBBINS & DAZEY, DATED DECEMBER 17, 1892, CERTIFIED BY DEFENDANT FOR $31,000.)	
Overdrawn at close of business January 2, 1893	77,515.59
Deposited January 3, 1893	79,941.25
Checked out January 3, 1893	40,551.50
Overdrawn at close of business January 3, 1893	38,125.84
(CHECK OF DOBBINS & DAZEY, DATED JANUARY 3, 1893, CERTIFIED BY DEFENDANT FOR $40,000.)	
Overdrawn at close of business January 23, 1893	62,153.37
Deposited January 24, 1893	889.47
Checked out January 24, 1893	22,982.50
Overdrawn at close of business January 24, 1893	84,256.46
(ONE CHECK OF DOBBINS & DAZEY FOR $3,000, AND ONE FOR $11,724.89, BOTH DATED JANUARY 24, 1893, CERTIFIED BY DEFENDANT.)	
Deposited January 25, 1893, nothing.	
Checked out January 25, 1893	38,336.89
Overdrawn at close of business January 25, 1893	122,593.29
(BOTH OF THE CHECKS DATED JANUARY 24, 1893, CERTIFIED BY DEFENDANT, WERE STAMPED "PAID JANUARY 25, 1893.")	

Overdrawn at close of business February 11, 1893....	$49,454.69
(February 12 was a holiday.)	
Deposited February 13, 1893.....	4,589.78
Checked out February 13, 1893	23,378.82
Overdrawn at close of business February 13, 1893....	68,243.73
(CHECK OF DOBBINS & DAZEY, DATED FEBRUARY 13, 1893, CERTIFIED BY DEFENDANT FOR $9,641.95.)	
Deposited February 14, 1893.....	34,965.00
Checked out February 14, 1893	39,641.95
Overdrawn at close of business February 14, 1893....	72,920.68

In other words, on December 9, 1892, at the close of business the individual ledger of the bank showed that Dobbins & Dazey's account was overdrawn in the sum of $64,417.97, and on that day the defendant certified that firm's check for $15,000.

At the close of business December 17, 1892, Dobbins & Dazey's account was overdrawn in the sum of $51,072.65, and on that day their check for $31,000 was certified by the defendant.

At the close of business January 2, 1893, Dobbins & Dazey's account was overdrawn $77,515.59, and at the close of business the next day, $38,125.84, on which day defendant certified their check for $40,000.

At the close of business January 24, 1893, the account of Dobbins & Dazey was overdrawn $84,256.46, and on that day the defendant certified two checks of Dobbins & Dazey—one for $3,000 and one for $11,724.89.

At the close of business January 25, 1893, the account of Dobbins & Dazey was overdrawn $122,593.29, and both of the checks dated January 24, 1893, and certified by the defendant, were stamped, "Paid January 25, 1893."

At the close of business February 11, 1893, Dobbins & Dazey had overdrawn their account $49,454.59 (February 12 was a holiday), and at the close of business February 13, 1893, their account was overdrawn $68,243.73. On that day the defendant certified their check for $9,541.95.

The Government's evidence tended to show directly that Frank Porterfield, the cashier, and all the employees of the bank below the cashier, had knowledge of the condition of Dobbins & Dazey's account, and of the fact that it was continuously and largely overdrawn during the period covered by the checks certified by the defendant.

The defendant, on cross-examination, was unable to give the name of a single person who worked in that bank, from the porter who swept the floor to the defendant, who was president of the bank, who did not know that Dobbins & Dazey's account was largely and continuously overdrawn; though the defendant stated that *he did not know* the fact, notwithstanding he was the *highest officer* in the bank.

The evidence showed that the defendant was very intelligent and an exceedingly good business man; that he worked up custom and patronage for the bank; secured influential men for the directory; corresponded with country banks; secured their accounts, and entertained their officials when visiting the city. He secured the business of new corporations which were being organized; and he settled, collected, or secured such bad and doubtful debts as were referred to him for that purpose by the directors or committees of the bank. He had a

desk in the directors' room in the rear end of the banking house. He had access to the books of the bank, and was frequently among the clerks and bookkeepers in the front part of the banking house, where the books were kept, making inquiries concerning various matters and accounts from time to time.

There was evidence showing that where a check was presented to the teller, and he knew that the drawer had the money to his credit in the bank, the custom was for the teller to certify the check without referring it back to the cashier or anyone else. There was no evidence that any of the checks certified by the defendant were ever presented to the teller.

The defendant, instead of following the custom of the bank in certifying checks, and instead of requiring said checks to be presented to the teller for certification, assumed to certify them himself, and he admitted, on cross-examination, that he had certified checks for persons other than Dobbins & Dazey.

He stated that when he certified checks for persons other than Dobbins & Dazey he went wherever he thought he could get the information—to the teller or bookkeeper.

He was then asked this question: "Suppose I had an account with the Commercial National Bank and I wanted you to certify a check, who would you, in the ordinary course of business, go to to find out whether or not you could certify that check?"

His answer was, "Either go to the bookkeeper or teller, and ask him what he knew about it."

He admitted, however, that when he certified the checks of Dobbins & Dazey he did not ask the teller or

the ledger bookkeepers of the bank if the account of Dobbins & Dazey was overdrawn.

He stated that when he certified the checks of Dobbins & Dazey he went to Porterfield with reference to them.

The Government anticipated that the defendant would claim that he got his information in regard to Dobbins & Dazey from Porterfield; and the Government, while not believing that Porterfield gave him the information which he says he got from Porterfield, undertook, as a part of its case in chief, to show why the defendant could not have relied, and did not, in fact, rely upon the information which he claims to have obtained from Porterfield in regard to the account of Dobbins & Dazey.

The Government introduced evidence tending to show that during and prior to the period covered by the dates of the checks certified by the defendant, one George A. Dazey, in the name of his firm of Dobbins & Dazey, was conducting a system of what is known among banks as "kiting," between Nashville and New York, and that his method of operation was as follows:

He would draw, in the name of Dobbins & Dazey, large drafts on the New York correspondents of his firm, John Monroe & Co., and Latham, Alexander & Co., bankers and brokers, and deposit and discount those drafts *without any bills of lading attached*, and take credit for the proceeds, *as cash*, on the account of Dobbins & Dazey in one or the other of the two banks of Nashville, in which they carried regular accounts, namely, the Commercial National Bank and the First National Bank.

Dazey would then draw, in the name of Dobbins & Dazey, checks on said Commercial National Bank or on

said First National Bank. Said checks were generally drawn in favor of the Fourth National Bank of Nashville (though sometimes they were drawn in favor of the American National Bank). They were then certified by the Commercial National Bank or by the First National Bank, and the Fourth National Bank or the American National Bank would transmit to New York by wire the money necessary to meet the drafts of Dobbins & Dazey maturing in New York. Those banks would then reimburse themselves by collecting the amount of the checks from the Commercial National Bank or from the First National Bank, as the case might be.

Dazey would then draw another set of drafts in the name of Dobbins & Dazey, without bills of lading attached, on the same drawees in New York, and take credit for their proceeds as cash in the Commercial National Bank or in the First National Bank. He would then draw a second set of checks on the Commercial National Bank or on the First National Bank. The second set of checks, like the first, would be drawn in favor of the Fourth National Bank, or the American National Bank; and they would be certified by the Commercial National Bank, or by the First National Bank.

The Fourth National Bank, or the American National Bank, would then transmit to New York, by wire, the amount necessary to meet the second set of drafts; and they would again reimburse themselves by collecting the second set of checks from the Commercial National Bank, or from the First National Bank, as the case might be.

The same process was repeated again and again; the volume of such transactions continually increasing.

When each of said drafts was drawn upon John Monroe & Co., and Latham, Alexander & Co., Dobbins & Dazey were, according to their own books, largely overdrawn with the drawees.

During the period between September 6, 1892, and March 1, 1893, the Fourth National Bank transmitted to New York, for Dobbins & Dazey, on checks drawn by them on the Commercial National Bank, $1,829,427.25, and transmitted $1,633,524.25 on checks drawn by them on the First National Bank. When the Commercial National Bank failed on March 25, 1893, it had on hand drafts amounting to $142,000, which had been drawn by Dobbins & Dazey on New York, and discounted and credited to them by the Commercial National Bank on February 27, 1893. Said drafts were protested for nonpayment on March 1, 1893, and have never been paid.

It will be seen that the greater part of said "kiting" process was carried on through the Commercial National Bank, of which the defendant was president.

It will be seen that said "kiting" process was carried on continuously for six months lacking only six days.

It will be seen that during that period said bank received and credited *as cash* drafts of Dobbins & Dazey to the amount of $1,829,427.25, *which had no bills of lading attached*, and which were drawn upon persons in New York, with whom Dobbins & Dazey were already largely overdrawn.

During the same period checks drawn by Dazey in the name of Dobbins & Dazey on the Commercial National Bank were certified and paid by that bank to the amount of $1,829,427.25.

Although said bank was, during that period, accepting and crediting, *as cash*, drafts of Dobbins & Dazey *which had no bills of lading attached*, and which were drawn upon persons in New York *with whom Dobbins & Dazey were already largely overdrawn*, the account of Dobbins & Dazey with the Commercial National Bank was at the times said checks were certified, largely and continuously overdrawn.

Within a period of six months this bank, with a capital stock of $500,000, paid upon the checks of Dobbins & Dazey almost $2,000,000, when at the time of almost every payment Dobbins & Dazey not only did not have the funds with which to pay them, but were then largely indebted to the bank on account of an overdraft.

The character of this banking was so criminally reckless that it must have been perfectly apparent to everyone engaged in it, and was so criminally reckless that the president of the bank, with a desk in the banking office within a few steps of a ledger which showed each day all overdrafts, must have known it, notwithstanding the fact that he testifies positively in this case that he did not know it.

The evidence tended to show that when the Fourth National Bank began to telegraph money to New York for Dobbins & Dazey, in the fall of 1892 (upon their checks certified by the Commercial National Bank), the

Fourth National Bank occasionally carried the checks over to the following day—that is, when they came in after 11 o'clock, they would be carried over and paid the next day; but later on this was changed, and the Fourth National Bank required that the checks be paid the same day, and before the money was telegraphed by it to New York.

In other words, the character of the transaction became so flagrant, that the Fourth National Bank refused to transmit money to New York upon the checks of Dobbins & Dazey, even though they were certified by the Commercial National Bank; and required that they should not only be certified, but actually paid by the Commercial National Bank, before the Fourth National Bank would telegraph the money to New York.

It will be seen that it was absolutely essential to the success of said "kiting" process, that the checks of Dobbins & Dazey on the Commercial National Bank should be *promptly* and *continuously* certified and paid; so as to induce the Fourth National Bank to transmit the money by wire to New York, with which to meet the maturing drafts.

If the checks which the defendant certified had not been certified, it is manifest that the "kiting" bubble would have burst at once.

It will also be seen that a conspiracy, which included only Dazey and Porterfield, would have been wholly inadequate for the purpose; because if Porterfield had happened to be sick, or out of the city for a single day, it would have been impossible to secure the certification and payment of checks drawn that day by Dobbins & Dazey

on the Commercial National Bank; the Fourth National Bank would, as a consequence, have refused to telegraph money to New York to meet the maturing drafts; the drafts would have been protested for nonpayment, and the "kiting" transaction would have been immediately exposed.

The defendant was, therefore, an essential factor in the conspiracy, so that if Porterfield should happen to be out of the bank when one of Dobbins & Dazey's checks should be presented, the defendant could certify it, and thus secure its payment, and the prompt transmission of the money by the Fourth National Bank to New York to meet the maturing drafts.

The motive which induced the defendant to become a party to the conspiracy is to be found in the evidence which tended to show that the defendant and Porterfield were each engaged in speculations in cotton futures through Dobbins & Dazey during the period covered by the dates of the checks certified by defendant and Porterfield *and without furnishing any margins;* and that the funds of the Commercial National Bank were used by Dobbins & Dazey in such speculations with the knowledge of defendant.

There was also evidence tending to show that certain officers of the First National Bank were speculating in cotton through Dobbins & Dazey during the period in which that bank was accepting the unsecured drafts of Dobbins & Dazey as cash, and was certifying Dobbins & Dazey's checks to carry out said "kiting" transactions.

It will be remembered that the First National Bank and the Commercial National Bank were the only two

banks that certified the checks of Dobbins & Dazey; and, as might have been expected, the evidence tended to show that certain officers of each of said banks were speculating in cotton through Dobbins & Dazey during the period in which the checks were being certified.

In further support of its contention that the defendant, in certifying the checks of Dobbins & Dazey, could not have relied, and did not, in fact, rely upon any information which he claims was obtained by him from Porterfield, the Government, as part of its case in chief, introduced evidence tending to show that, commencing about two years after the Commercial National Bank was organized, and continuing with but slight interruptions, down to the failure of said bank, the defendant and said Porterfield were jointly engaged in speculations in stocks and bonds; and that the moneys of said bank were used in said speculations *with the knowledge and consent of the defendant.*

There was evidence tending to show that in 1886 and 1887 a large amount of the moneys and funds of the bank were used by Porterfield, as cashier, *with the knowledge of the defendant*, but without the knowledge or consent of the bank, its directors, or committees, to purchase, on speculations, stocks *for the joint account of himself and defendant*, and of other persons, in the name of the bank, or himself as cashier.

The evidence tended to show that on November 12, 1886, 200 shares Hocking Valley stock were sold through Kohn, Popper & Co., New York bankers and brokers; that it was sold at a net profit of $424.46; one-half of

which was credited on the books of the bank to Porterfield, and one-half to the defendant.

That on November 26, 1886, 100 American Cotton Oil certificates were sold through Kohn, Popper & Co. at a net profit of $980.58; one-half of which was credited to Porterfield, and one-half to the defendant.

That on December 16, 1886, 200 shares of Tennessee Coal, Iron and Railroad stock were sold through De Neufville & Co., New York bankers and brokers; that it was sold at a new profit of $2,933.18; one-half of which was credited to R. S. Cowan (the assistant cashier of the Commercial National Bank); one-fourth was credited to Porterfield; and one-fourth to the defendant.

That on January 15, 1887, 1,200 shares ($25 each) of Nashville and Chattanooga Railroad stock, and 300 shares Tennessee Coal, Iron and Railroad stock, were sold through Latham, Alexander & Co., New York bankers and brokers; that it was sold at a net loss of $9,762.35; one-third of which was charged against Porterfield; one-third against R. S. Cowan; and one-third against defendant.

That for the one-third of the loss ($9,762.35) just stated, namely, $3,254.12, chargeable to the defendant, he gave his demand note to the bank on May 20, 1887, secured by certain collaterals.

That on December 10, 1889, the defendant took up said note with the proceeds of a demand note of that date for $4,000, secured by collaterals.

That on March 16, 1893 (only nine days before the bank failed), the defendant took up the $4,000 note with

the proceeds of a demand note of that date for $5,500, secured by collateral.

It is true that all three of said notes were approved by the executive committee; *but the defendant did not at any time inform the executive committee, or the directors of the bank, that those notes, or any part of them, were given to cover losses on stock.*

Said note of $5,500 is still unpaid. All the memoranda, tickets, and slips showing said purchases and sales, and the profits and losses, including the deposit tickets on which profits were credited to Cowan, and the defendant, were wholly in the handwriting of Porterfield.

The profits credited to the defendant from said sales of stock were credited to him on the books of said bank at the times of said sales; and afterwards they were credited on his pass book and drawn out by him.

There was evidence tending to show that defendant accepted and used the exact amount of profits, and accounted for the exact amount of losses, that were shown upon the accounts, statements, tickets, slips and memoranda, made out by Porterfield in reference to said transactions.

The following sums of money, belonging to the Commercial National Bank, were remitted by Porterfield, as cashier, to be used as margins on stock transactions:

February 18, 1886, sent to Kohn, Popper & Co	$1,250.00
March 29, 1886, sent to Kohn, Popper & Co	500.00
April 10, 1886, sent to Kohn, Popper & Co	1,500.00
May 6, 1886, sent to Kohn, Popper & Co	500.00
May 11, 1886, sent to Kohn, Popper & Co	500.00
May 14, 1886, sent to Kohn, Popper & Co	2,425.44
June 12, 1886, sent to Kohn, Popper & Co	605.10

June 17, 1886, sent to Kohn, Popper & Co	$1,000.00
July 8, 1886, sent to Kohn, Popper & Co	1,000.00
August 31, 1886, sent to Kohn, Popper & Co	2,000.00
October 6, 1886, sent to Kohn, Popper & Co	2,000.00
October 27, 1886, sent to Kohn, Popper & Co	1,000.00
November 26, 1886, sent to De Neufville & Co	5,000.00
December 15, 1886, sent to De Neufville & Co. (through Latham, Alexander & Co.)	10,000.00
December 15, 1886, sent to De Neufville & Co. (through Herzfeld & Co.)	5,000.00
December 20, 1886, paid to De Neufville & Co. (by Latham, Alexander & Co., and charged to the Commercial National Bank)	32,037.04
Total	66,317.58

In other words, there was evidence tending to show, that as far back as 1886–87, the defendant knew that Porterfield was misappropriating the moneys of the bank by using them to margin stock speculations in New York.

Though some of the stocks were bought for the customers of the bank, the profits or losses on the stocks mentioned above in this section, were divided equally between Porterfield and the defendant; or they were divided between Porterfield and the defendant and Cowan.

Porterfield made all the memoranda, tickets, and slips showing said purchases and sales, and the profits and losses; and the defendant accepted and used the exact amount of profits, and accounted for the exact amount of losses that were shown upon the memoranda or statements made out by Porterfield in reference to said transactions.

In brief, Porterfield acted as a bookkeeper to keep account of the profits and losses in which the defendant

participated; and defendant settled according to the divisions as made by Porterfield.

The evidence tended to show that the moneys of said bank were used by Porterfield in said transactions, with the knowledge and consent of the defendant; but without the knowledge and consent of the bank, its directors, or committees.

Four of said speculations resulted profitably; and in every instance the defendant's share of the profits were credited on his pass book, and drawn out by him.

The fifth transaction resulted in a loss, and the defendant, instead of paying his share of the loss in money, executed his note, which has been twice renewed, and it has been increased at each renewal. Neither at the execution of the original note, nor at the execution of the two renewals, did he inform the executive committee that they represented losses on stocks.

The Government insists that as far back as 1886–87, the defendant was bound to know, and did in fact know, that Porterfield was misapplying the funds of the bank. That the misapplication was not merely an act of technical *ultra vires;* but an intentional misuse of the bank's money in carrying speculative stock transactions, in which he and the defendant, the two chief officers of the bank, were participating, without the knowledge or consent of the directors and committees of the bank.

With the knowledge which the defendant thus acquired of Porterfield, as far back as 1886–87, he ought not to have relied, and could not, in fact, have relied upon any statement which he claims that Porterfield made to him in regard to Dobbins & Dazey's account.

In further support of his contention that the defendant, in certifying the checks of Dobbins & Dazey, could not have relied, and did not, in fact, rely upon any information which he claims to have obtained from Porterfield, the Government, as part of its case in chief, introduced evidence tending to show that in March, 1889, an account styled "Frank Porterfield, separate," was opened by Porterfield with Herzfeld & Co., New York bankers and brokers; that said account was opened for the joint benefit of Porterfield and the defendant, and by previous arrangement and understanding between them; that a draft was drawn on Nashville for $1,500, as a margin on said account; which draft was paid by defendant; that certain purchases and sales, made on said account, resulted in a profit of $400, which was received by Porterfield on March 23, 1889, and which he subsequently divided with the defendant.

The evidence also tended to show that thereafter the following stocks were purchased, on said account for the joint account of Porterfield and the defendant, namely:

100 N. P. Co., bought June 4, 1890.
100 Mo. Pac., bought June 4, 1890.
100 Mo. Pac., bought June 6, 1890.
100 Tex. Pac., bought June 7, 1889.
100 Atchison, bought June 9, 1890.
100 L. & N., bought June 10, 1890.
100 Rich. Term., bought June 11, 1890.
100 N. West., bought June 11, 1890.
100 Chicago Gas, bought June 11, 1890.
100 Atchison, bought June 12, 1890.
100 L. & N., bought June 16, 1890.
100 C., C., C. & St. L., bought June 19, 1890.
100 Un. Pac., bought October 9, 1890.

100 Un. Pac., bought October 22, 1889.
100 N. P., preferred, bought October 25, 1889.
100 St. Paul, bought November 20, 1889.
100 St. Paul, bought December 9, 1889.
100 Un. Pac., bought March 20, 1890.

From the opening of said account in March, 1889, to August 18, 1890, there were purchased on it from time to time, 3,500 shares of stocks of various kinds, including those just mentioned.

Two hundred shares of Union Pacific on hand May 24, 1889, were sold, resulting in a net profit of $1,290.52 over and above the margin of $1,500; and on May 16, 1890, a check was received by Porterfield from Herzfeld & Co., for said profit ($1,290.52), one-half the proceeds of which he placed to his own credit, and the other half to the credit of the defendant, on their respective individual accounts in the Commercial National Bank.

Said Herzfeld & Co.'s account also showed the following purchases of stock on said account, after September 15, 1890, namely:

100 shares Atchison, September 29, 1890.
100 shares Atchison, October 20, 1890.
100 shares C., C., C. & St. L., May 19, 1891.
100 shares Tenn. C. & I., June 5, 1891.
100 shares Ches. & Ohio, September 1, 1891.
100 shares West. Union, September 8, 1891.
100 shares Tenn. C. & I., October 2, 1891.
100 shares Mo. Pac., October 13, 1891.
100 shares Tenn. C. & I., October 14, 1891.
100 shares Mo. Pac., October 30, 1891.
100 shares L. & N., November 9, 1891.
100 shares Un. Pac., December 1, 1891.
100 shares Mo. Pac., December 2, 1891.

100 shares N. P. preferred, January 15, 1892.
100 shares Un. Pac., January 21, 1892.
100 shares N. Y. & N. E., January 21, 1892.
100 shares N. Y. & N. E., January 25, 1892.
200 shares Reading, January 26, 1892.
100 shares L. & N., January 29, 1892.
100 shares Rock Island, February 1, 1892.
100 shares Wabash, preferred, February 3, 1892.
200 shares Reading, February 3, 1892.
100 shares N. Y. & N. E., February 4, 1892.
100 shares L. & N., February 4, 1892.
100 shares Tenn., C. & I., February 5, 1892,
100 shares Un. Pac., February 9, 1892.
100 shares Un. Pac., February 11, 1892.
100 shares Atchison, February 17, 1892.
100 shares Wab., preferred, February 18, 1892.
100 shares N. P., preferred, February 18, 1892.
100 shares L. & N., February 23, 1892.
100 shares Rich. Term, March 4, 1892.
100 shares N. P., preferred, March 28, 1892.
100 shares Un. Pac., March 29, 1892.
100 shares St. Paul, April 11, 1892.
100 shares Tenn. C. & I., April 25, 1892.
100 shares L. & N., June 20, 1892.
100 shares L. & N., June 27, 1892.
100 shares Rock Island, July 14, 1892.
100 shares Un. Pac., August 12, 1892.
100 shares Rock Island, September 1, 1892.
100 shares L. & N., September 30, 1892.
100 shares St. Paul, November 4, 1892.
100 shares Un. Pac., November 4, 1892.
100 shares Rock Island, November 28, 1892.
100 shares St. Paul, January 31, 1893.
100 shares Wab., preferred, February 9, 1893.

Total, 4,900 shares, purchased after September 15, 1890.

It will be seen that there were purchased on said account between March, 1889, and August, 1890—

	Shares.
Stocks of various kinds amounting to	3,500
And that between September 29, 1890, and February 9, 1893, there were purchased	4,900
Total purchased	8,400

Assuming the nominal value per share at $100, the total nominal value of the stocks purchased was $840,000.

It will be seen that said purchases were made from time to time as follows, namely:

In March, June, October, November, and December, 1889.

In March, June, September, and October, 1890.

In May, June, September, October, November, and December, 1891.

In January, February, March, April, June, July, August, September, and November, 1892.

And in January and February, 1893.

The Commercial National Bank failed March 25, 1893.

Said purchases were, therefore, practically continuous from the time said account was opened in March, 1889, to the failure of the bank in 1893.

The margins paid to Herzfeld & Co. to carry said account were as follows:

A draft was drawn on Nashville for $1,500 as margin, which was paid and credited on said account March 21, 1889; and there was evidence tending to show that said draft was paid by the defendant.

Porterfield and the defendant made their joint demand note on August 15, 1890, for $2,000, payable to the Commercial National Bank, which was approved

by the executive committee, and the proceeds of its discount were used as a margin on said account; *but the executive committee had no knowledge that said note was given for margins.*

Said account also showed the following sums of money remitted by Porterfield to Herzfeld & Co. on said accounts, which were the moneys of the Commercial National Bank, namely:

October 10, 1890	$2,000.00
October 18, 1890	1,000.00
November 10, 1890	2,000.00
November 12, 1890	1,000.00
November 24, 1890	3,000.00
July 30, 1891	1,000.00
May 23, 1892	1,000.00
June 10, 1892	2,000.00
October 29, 1892	1,152.30
February 27, 1893	1,500.00
March 2, 1893	2,000.00
Total	17,652.30

The Commercial National Bank failed March 25, 1893.

Porterfield testified that the defendant did not withdraw from the account; that defendant well knew all the time that the purchases were continued and the account was kept in force; that defendant and he (Porterfield) were jointly interested in said account; and that there was no suggestion of any withdrawal between them at any time.

Porterfield also testified that the defendant knew that he (Porterfield) was sending margins to Herzfeld & Co. to margin said account, and that the money which Porterfield was sending to margin the account was the money of the Commercial National Bank.

The defendant admitted that he was jointly interested in said account with Porterfield from May 24, 1889, until about September 15, 1890, when he says he withdrew from it, and had no further connection with it.

He does not claim to have notified Herzfeld & Co. of his withdrawal.

He does not claim to have had any settlement with Porterfield by which said joint account was closed.

The Government contended that from March, 1889, until the Commercial National Bank failed in March, 1893, the defendant knew that Porterfield and he were speculating on joint account in stocks through Herzfeld & Co.; and that Porterfield was misapplying the moneys of said bank to margin said account.

The Government contended that such conduct on the part of Porterfield was not an act of mere technical *ultra vires*, but a willful misuse of the bank's money to subserve the speculating purposes of the defendant and himself, who were the two chief officers of the bank.

And the Government also contended that, as the defendant had full knowledge of Porterfield's conduct, he could not have relied, and did not, in fact, rely upon any information which he claims to have obtained from Porterfield in regard to Dobbins & Dazey's account.

In further support of its contention that the defendant, in certifying the checks of Dobbins & Dazey, could not have relied, and did not in fact rely, upon any information which he claims to have obtained from Porterfield, the Government, as part of its case in chief, introduced evidence tending to show that on October 3, 1889, an account was opened, in the name of "Porterfield &

Spurr," with Latham, Alexander & Co., New York, bankers and brokers.

Said account showed purchases of stock as follows:

	Shares.
October 3, 1889	100
October 4, 1889	100
November 4, 1889	200
November 12, 1889	200
November 21, 1889	100
November 29, 1889	100
December 2, 1889	100
December 2, 1889	200
January 30, 1890	100
January 31, 1890	100
March 19, 1890	100
June 9, 1890	100
August 19, 1890	100
September 26, 1890	100
September 29, 1890	100
September 29, 1890 (North America)	100
August 19, 1892 (Reading)	200
Total	2,100

Assuming the nominal value of each of said shares to be $100, the total nominal value of all of said shares would be $210,000.

The evidence also tended to show the following purchases of cotton on said account, namely:

	Bales.
November 14, 1892	500
November 19, 1892	500
November 15, 1892	500
December 1, 1892	1,000
December 27, 1892	500
February 21, 1893	1,000
Total	4,000

Assuming the value, per bale, of said cotton to be, say, $50, the total value of said cotton would be $200,000; and the aggregate value of said stock and cotton purchased on said account, between October 3, 1889, and February 21, 1893, would be $410,000.

There was no controversy by the defendant concerning the purchase and sale of the 15 blocks of stock first above mentioned, and which were purchased, as shown above, between October 3, 1889, and September 29, 1890. He admitted that he was consulted about them by Porterfield, and authorized them to be made.

But he said that he was not consulted about the purchase of the above-mentioned 200 shares "Reading" stock, bought August 19, 1892, and 100 shares "North America" stock, bought September 29, 1890, and that he did not authorize their purchase.

The above-mentioned 500 bales of cotton, purchased November 14, 1892, were sold November 16, 1892, at a profit of $595.02. Said profit was sent, by check, to Porterfield, and it was equally divided between him and the defendant.

One of the above-mentioned lots of 500 bales of cotton, purchased November 19, 1892, was sold November 25, 1892, at a profit of $983.20; and the other lot of 500 bales, purchased November 19, 1892, was sold December 27, 1892, at a profit of $624.43. Both of said profits were credited by Latham, Alexander & Co., to Porterfield & Spurr on said account.

The defendant admitted that he authorized those three purchases of cotton, and was fully informed of them by Porterfield.

The defendant, however, said that he was not consulted about the purchase of the above-mentioned 1,000 bales of cotton purchased December 1, 1892, the 500 bales purchased December 27, 1892, and the 1,000 bales purchased February 21, 1893. He said that he had no knowledge of them, and did not authorize them.

It so happens that losses were sustained amounting to over $15,000 upon the particular 2,500 bales of cotton and the particular 300 shares of stock with reference to which the defendant says he was not consulted, and which he says he did not authorize.

Porterfield testified that the defendant knew all the time that the purchases were continued; that the account was kept in force; that he and defendant were jointly interested; and that there was no suggestion of withdrawal between them at any time.

There was evidence tending to show that Porterfield sent to Latham, Alexander & Co., on said account, out of the moneys and funds of the Commercial National Bank, the following sums, credited on said account, at the dates stated, namely:

November 14, 1890	$1,500.00
December 8, 1892	4,000.00
February 7, 1893	1,000.00
February 13, 1893	1,000.00
February 14, 1893	1,500.00
February 18, 1893	1,500.00
March 1, 1893	2,600.00
Total	13,100.00

The Commercial National Bank failed March 25, 1893.

The defendant stated that he was not consulted about any of said remittances, that he had no knowledge of them, and that he did not authorize them.

Porterfield testified that the defendant knew of all the purchases of stocks and cotton, and knew that he (Porterfield) was remitting the moneys of the bank to New York upon them.

The Government contended that from October 3, 1889, down to the failure of the Commercial National Bank, the defendant knew that Porterfield was continuously speculating in stocks and cotton, through Latham, Alexander & Co., for the joint account of himself and the defendant; and from November 14, 1890, down to the failure of the bank, defendant knew that Porterfield was continuously sending large amounts of the bank's money to Latham, Alexander & Co., to margin said accounts.

The Government contended that Porterfield's conduct was not an act of mere technical *ultra vires*, but a willful misapplication of said moneys of the bank. And as the defendant was fully apprised of Porterfield's conduct, he could not have relied, and did not in fact rely, upon any information which he claims to have obtained from Porterfield in regard to Dobbins & Dazey's account.

The defendant claimed that in certifying the checks of Dobbins & Dazey he relied exclusively upon information which he had received from Porterfield. The Government claimed to have shown that the defendant was bound to know and did, in fact, know that Porterfield could not be relied upon for such information. The Government insisted that the defendant in applying to Porterfield for information, instead of applying to the teller and bookkeepers, was willfully seeking to obtain false information, and was willfully shutting his eyes to

true information, and therefore in certifying the checks of Dobbins & Dazey he acted *willfully and with bad intent to injure the bank.*

The evidence upon the trial of this case showed, or tended to show, that the defendant certified the checks of Dobbins & Dazey mentioned in the indictment as "good." That when he marked these checks "good" they were not "good," but, on the contrary, the account of Dobbins & Dazey was then largely overdrawn.

That the defendant was the president and highest officer of the bank; that he had a desk in the bank; that near him was a ledger known as the "Overdraft ledger," upon which was plainly marked the condition of the account of Dobbins & Dazey, and other creditors, as to whether they had a balance to their credit or were overdrawn, and one glance at which would have shown the defendant when he certified these checks that the account of Dobbins & Dazey was largely overdrawn and that these checks were not "good."

That the Commercial National Bank was receiving and crediting to the account of Dobbins & Dazey, *as cash*, the drafts of Dobbins & Dazey, *without bills of lading attached;* and there was evidence that the defendant and Porterfield, who was the cashier of the bank, were at this time, speculating in cotton through Dobbins & Dazey *without furnishing margins.*

That in 1886 and 1887 Porterfield, the cashier, *with the knowledge and consent of the defendant*, was using the money of the bank in speculations for the joint account of himself and the defendant, but *without the knowledge of the directors.*

That when certifying the checks of persons other than Dobbins & Dazey the defendant inquired of the teller or bookkeeper as to the state of the account but when it came to certifying the checks of Dobbins & Dazey, the smallest of which was larger than the largest check certified for anyone else, the defendant (taking his statement) departed from the usual custom of the bank, and in the trifling matter of certifying the check of Dobbins & Dazey for the small sum of $40,000 did not deem it necessary to make inquiry of the teller or bookkeeper (but instead, went to Porterfield, whom, as the evidence in this case shows, he had reason to believe would not tell him the truth) as to the state of their account, although the account of Dobbins & Dazey was then overdrawn $38,125.84, and the overdraft ledger, within a few feet of him, showed that fact.

Upon this and other facts as criminally reckless shown at the trial, the trial court instructed the jury as follows:

INSTRUCTIONS GIVEN BY THE TRIAL JUDGE TO THE JURY.

GENTLEMEN OF THE JURY: Your patience and fidelity in the attention which you have given to this case thus far afford ample grounds for confidence that you will pursue your duty to the end with the same sincere fidelity of purpose.

The conduct of their business by national banks is carefully hedged about by many provisions of law intended for the security of the public doing business with them and of their stockholders. The necessity for that security requires that those provisions should be faithfully enforced. The courts of the United States are the proper tribunals for

that purpose. We are called upon in the present case to discharge that duty upon indictments charging grave violations of this law. Great care must be taken that punishment shall not fall upon an innocent person, but it is equally our duty, if the charges are proven beyond a reasonable doubt, to proceed to the conclusion which legal justice requires. The usage and practice of these courts is founded upon the legal proposition that it is the province of the court to decide all questions of law, and that it is the province of the jury to decide the questions of fact. Whatever may be the usage and practice in the State courts of Tennessee, the law of the United States, by which the court and jury are bound in the disposition of this case, is to the effect which I have just stated. The sum of the matter is, then, that the jury are bound by the instructions of the court as to matters of law. The suggestions of the court as to evidence, touching matters of fact, are for the assistance of the jury, but it is the right and duty of the jury to finally determine all questions of fact without being trammeled by the suggestions of the court. It is usual in these courts for the judge to make such comments upon the evidence as the court may think expedient for the purpose of aiding the jury in reaching a disposition of the case upon its substantial issues, but this is the limit of the duty of the court upon such matters, and the jury will receive and act upon such suggestions so far as they may find them useful to them in their inquiry after the truth.

The specific charges upon which the defendant is now being tried are the certification of the following checks:

Check of Dobbins & Dazey on the Commercial National Bank to Fourth National Bank, dated December 9, 1892, for $15,000.

Check of Dobbins & Dazey on Commercial National Bank to Fourth National Bank, dated December 17, 1892, for $31,000.

Check of Dobbins & Dazey on Commercial National Bank to Fourth National Bank, dated January 3, 1893, for $40,000.

Check of Dobbins & Dazey on Commercial National Bank to Fourth National Bank, dated February 13, 1893, for $9,641.95.

Each of the offenses thus charged constitutes a specific violation of the law. It is competent for the jury to find the defendant guilty of all, or not guilty of any, or guilty of some and not guilty of others; or to find the defendant guilty or not guilty of some of them, being unable to agree as to others. It is upon the false certification of the four above-mentioned checks that the issues of this case are joined. The evidence of the former application of the funds of the Commercial National Bank by Mr. Porterfield in his own speculations and those of himself and Spurr, with the knowledge of Spurr, has been admitted for a subsidiary purpose which will be presently explained. Reference is here made to the evidence of the transactions with DeNeufville & Co., Herzfeld & Co., Kohn, Popper & Co., and Latham, Alexander & Co., in New York.

In all trials upon accusation of crime the defendant is presumed to be innocent until that presumption is overborne by testimony proving him to be guilty. The defendant is entitled to such a presumption in this case. The fact that there have been former trials of this case does not affect your duty; you are responsible for your verdict, and you are not here to register the opinion of others nor to follow in their wake. Your conduct should be wholly unaffected by the result of such former trials.

The Government is bound in order to maintain any of the counts in these indictments to prove:

First, that the defendant certified the check.

Second, that the drawers of the check had not sufficient funds in the bank to meet such check.

Third, that the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offense charged will be explained and its modification stated further on.

Taking this evidence up in detail, it is not denied that the defendant certified these checks, and secondly, that the account of the drawers was overdrawn when these certifications took place; but third, the defendant asserts that he was not cognizant of the fact that the account of the drawers was overdrawn at the time of his certification of the checks.

The knowledge of the defendant of the state of Dobbins & Dazey's account when he certified the checks is thus made the pivotal question in the case. Upon this question of knowledge the court charges you that it is not necessary for the Government to show that the defendant knew of the lack of funds of Dobbins & Dazey from an actual examination of the books at that time or from any inquiries made at that time. If the defendant knew that he had good reason for believing Dobbins & Dazey's account to be overdrawn and refrained from making such inquiry for the reason that he knew the condition of the account or because he was purposed to certify the check without reference to whether there were funds sufficient to meet it or not, that is sufficient. That is to say, if he shut his eyes to what he believed was the fact, and kept himself in ignorance of the state of the account because he believed an

examination would disclose the facts, this would be equivalent to express knowledge. Nor is it necessary to prove that the defendant knew just what was the extent of the overdraft on Dobbins & Dazey's account, or of the lack of funds to meet the checks. If he knew of the substance of the fact that Dobbins & Dazey had no funds there to meet their check and that there was no warrant for marking the check "good," that was sufficient.

I am requested by counsel for the Government to instruct you, and you are charged that, if you are satisfied by the proof beyond a reasonable doubt that the account of Dobbins & Dazey with the Commercial National Bank was not a special but a general depositor's account, the deposits as they came into the bank were prima facie applicable to the liquidation of overdrafts which appeared on the account at the commencement of business, and were thus absorbed, and if the amount of deposits made during the day were not equal to the overdrafts with which the day commenced, you will consider that, as a matter of fact, there were no moneys on deposit on such day.

These checks before their certification were not obligations of the Commercial National Bank; they were made such by the act of the defendant in certifying them to be good; by that act his bank was estopped to deny its obligation to the other banks which held them. It was the defendant's duty before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty you may draw an inference of fact that he did so inform himself, if he did not already know it. But the presumption of knowledge is not an absolute one and the defendant may show, if he can,

that he did not, in fact, acquire information of the truth. And in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins & Dazey justified it, he is not guilty of the offense charged. Mere negligence or carelessness, unaccompanied by bad faith would not render him guilty.

Evidence has been offered to prove Dobbins & Dazey to have been heavily overdrawn for some time when some of these checks were certified by the defendant and that this fact was and for some time had been a matter of common knowledge among the employees of the bank; and further, that it was not customary for checks to be sent to the president for certification when there were funds in the bank belonging to the drawer sufficient to cover the check, and there is other evidence which, if believed, tends to show express knowledge on the part of the defendant of the state of the account; nevertheless he testifies that he did not know that Dobbins & Dazey's account was overdrawn when he certified these checks, or any of them, or that there was a lack of funds in the bank to pay them, and that he had no reason for supposing their account to be overdrawn or that there was too small a sum to their credit to meet them.

Gentlemen, do you think this is true? It is for you to say, and as you are responsible for your answer, I shall do no more than challenge your serious attention to the evidence in the case touching this question. Not only that I have referred to, but all else that reflects light upon it. If you believe this statement of the defendant to be true, there is an end of the case and the defendant should be acquitted; and the same result should follow if you are not satisfied beyond a reasonable doubt that the contrary is a fact.

In determining these questions you are to look to all the evidence bearing upon his knowledge and give all, its just effect. You are not restricted to the direct evidence of the fact, the moral probabilities flowing from conceded facts, or which are proven to your satisfaction should also be considered, and such probabilities may furnish ground for believing that that which they indicate is the truth.

Counsel for the defendant have submitted a series of requests for instructions, some of which I allow, others I give with modifications, which will be stated as I proceed, and others are declined, either because in the opinion of the court they do not correctly state the rule or are liable to mislead. Such of them as are granted, I will now proceed to read, and they will be regarded as part of the instructions of the court. They are to be taken, however, in connection with the propositions stated in these instructions by the court upon its own motion, and not as being in conflict with them.

I charge as requested: (1) "The statutes of the United States, under which the Commercial National Bank of Nashville was organized and conducted, do not prescribe or define the duties of the president and the cashier in respect to the books, accounts and details of the business of the bank; but they confer upon and vest in the board of directors the power to prescribe and define such duties and to adopt by-laws for that purpose."

Again: (2) "Certain by-laws of this bank have been put in evidence before you relating to the duties and responsibilities of the cashier and president, and these by-laws, being numbers 8 and 9, having been read and commented on in the argument, I instruct you that the former relating to the duties and responsibilities of the cashier, means that

he, the cashier, shall be responsible generally for all the moneys, funds, and valuables of the bank, and requires him to faithfully apply and account for all its moneys, funds, and valuables, and that he is primarily charged with the faithful keeping and accounting for the same. The latter, relating to the duties and responsibilities of the president, means that he is to be held responsible only for such sums of money and property of the bank as may be entrusted to his care, or placed in his hands by the board of directors, or by the cashier, or which may otherwise come into his hands as president, and that he is to be responsible only for such sums of money and property as may be thus placed or come into his hands, and is to faithfully and honestly apply and account for the same and otherwise faithfully discharge his duties as president. These two by-laws, taken together, mean and imply that the cashier is primarily responsible for all the funds, property and valuables of the bank, and that the president is responsible only for such funds, property, and valuables of the bank as may be placed in his hands or as may come into his hands as president, and that both these officers are each to faithfully and honestly discharge their respective duties." To this I add: But I further charge you that the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding these by-laws, to certify checks, and when the president assumed to certify these checks as good, the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn.

(3) "If you believe from the proof that at the organization of the bank, the cashier was a man of experience in the details of the banking business, and

that the president was without experience or special knowledge of such matters; and if you further find that in view of these facts, it was then understood and agreed by the board of directors that the cashier was to have immediate charge and supervision of the details, books, accounts and internal affairs of the bank, and that the president was to give his attention to working up custom and patronage and looking after such special matters as should be referred to him for his attention, it will be proper for you to keep in mind these facts, together with the by-laws relating to those officers, in connection with the other proof in the case, bearing on the question whether the defendant had knowledge of the state of the account of Dobbins & Dazey at the time when he certified the checks of that firm which are mentioned in the indictment, and give to them such weight as you think they are justly entitled to on the question whether or not the defendant did actually know of the state of the account at the time he certified said checks."

To which I add: But these are part only of the facts which you should consider upon the question of the defendant's knowledge; and further, this instruction is to be taken with the other instruction that actual knowledge is not necessary if the defendant purposely abstained from inquiry.

Then this request: (5) "If you find from the proof that the account of Dobbins & Dazey, upon the books of the bank, was overdrawn continuously during the period covered by the dates of the checks certified by the defendant and that the defendant was in fact ignorant of such overdraft; and that he certified the several checks mentioned in the indictment believing at the time that the exchange deposited by Dobbins & Dazey on the days upon which said checks were certified, was sufficient or

more than sufficient to cover the amount of said checks," besides the overdraft already existing, "then he is not guilty and you should acquit him," unless such ignorance of the overdraft was willful as elsewhere explained in the court's instructions. In this connection you will bear in mind what I have previously charged you, that if this was a general and not a special account of Dobbins & Dazey, the exchange which came in was applicable in the first place to the liquidation of the previously existing overdraft before there could be said to be any funds to the account of Dobbins & Dazey to respond to the checks.

(7) If you find "that in each instance where he certified a check the defendant had information from the cashier or exchange clerk, upon which he relied in good faith, that a sufficient amount had been deposited that day and was in the bank, to cover the check certified"—I add: In addition to the existing overdraft—"he would not be guilty under the indictment and you should acquit him."

(8) "If the proof fails to satisfy your minds clearly and beyond a reasonable doubt, that the defendant did actually know, at the time he certified the checks mentioned in the indictment that Dobbins & Dazey did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he willfully, designedly and in bad faith"—these words mean substantially the same thing,—"shut his eyes to the fact and purposely refrained from inquiry or investigation for the purpose of avoiding knowledge."

(10) "If you find from the proof that the defendant relied upon the statements and representations of the cashier as to the condition of the account of

Dobbins & Dazey, and that he did so in good faith believing those statements and representations to be true"—and such statements were made at or so near the time of the certifications as to be fairly regarded as indicating the present state of the account, "his certifications, made in honest reliance upon them, would not be criminal; and if the cashier was reputed to be and believed by the defendant to be, a man of honesty and" right conduct as respects the affairs of the bank, "the defendant would have the right to rely upon his statements in regard to that account."

(11) "The fact that the cashier had bought and sold stocks and bonds or cotton futures, and that the defendant knew that fact, would not establish or imply that he was personally dishonest nor deprive the defendant of the right to rely upon his statements in respect to the affairs of the bank, unless he also knew or had reason to believe that the cashier "had been using the funds or credits of the bank" instead of his own in such transactions. In order to deprive the defendant of the right to rely upon the cashier, it must be shown beyond a reasonable doubt that he knew that the cashier was unfaithful to the bank, and was acting" unlawfully in respect to its affairs.

(12) "The defendant in this case is not indicted, nor being tried for buying or selling stocks or bonds or cotton futures, nor is it any crime against the laws of the United States for a bank officer to deal in such matters,"—I interpolate, on his individual account without involving the bank. "You should not allow the proof on this subject to influence your verdict in any way, unless you find from the proof beyond a reasonable doubt, either that the defendant used the bank's funds dishonestly in such

transactions, or that he knew that the cashier was using the funds of the bank for his own personal interest, or the interest of others. If you find beyond a reasonable doubt that the defendant did know of the unlawful use of the bank's funds by the cashier, as before indicated, that fact would not of itself establish the defendant's guilt in this case, but would only be a circumstance to be considered by you in connection with the other evidence on the question whether the defendant knew, or was charged with knowing because he purposely abstained from knowledge, at the time of certifying the checks mentioned in the indictment, that Dobbins & Dazey did not have funds and credits on deposit in the bank sufficient to meet those checks."

(15) "The law presumes the defendant to be innocent, and this presumption stands as an all-sufficient witness in his favor until the Government establishes his guilt by competent proof to your satisfaction beyond a reasonable doubt."

(16) "The burden of proof rests upon the Government as to all the material facts and circumstances of the case, and if you have a reasonable doubt as to any fact or circumstance relied on by the Government," I should say, any material fact or circumstance relied on by the Government, "either as direct or inferential proof against him, you should resolve that doubt in his favor and dismiss such fact or circumstance from further consideration. You must be satisfied from the proof beyond a reasonable doubt, of every fact essential to the guilt of the defendant of the specific charges in this indictment before you will be warranted in convicting him."

I return now to the instructions given upon the court's own motion. The defendant, by a modern

statute, is rendered competent to testify in his own behalf. His testimony is subject to be estimated with reference to the interest which he has in the result, and the jury will give it such credit as they think it is justly entitled to in view of its quality, the witness's burden of interest and the bearing of the other evidence in the case upon it.

The using, by its officers, of the funds and credits of a national bank in speculation on stock and cotton exchanges carried on either in the interest of the bank or its officers as individuals, or any other persons is unlawful. Their franchises do not contemplate such operations and it is an abuse of the lawful powers of the bank, and such use is a misappropriation of the property of the bank. The fact, if it be such, that other national banks, however numerous they were, were engaged in such business did not render it legal, nor can the opinion of other persons that it was proper, rightfully affect the view which the court and jury must take of the legality of such practices. If the jury find from the evidence that Mr. Porterfield was engaged with the knowledge of Spurr in thus misusing the credits and funds of the bank on cotton and stock exchanges in speculations in his own or other persons' interest, the jury are at liberty to find in that a reason why Mr. Spurr should not have confidence in Mr. Porterfield's integrity and fidelity to the interests of the bank, and why Mr. Spurr would, in the exercise of his own duties, have exercised a closer scrutiny of the dealings of Dobbins & Dazey with the bank, especially if he had reason to suppose that firm was engaged in such speculations.

The defendant is not on trial directly for his complicity with such previous speculations and misuse of the bank's property in them, and proof of them

has been admitted, and is to be applied by the jury solely upon the question of the knowledge and intent of the respondent, when he made the false certifications of the checks mentioned in the indictment.

Mr. Porterfield has been called to the stand as a witness. The court has been requested to instruct you in regard to the proper weight to be given to his testimony. He is a competent witness as a matter of law. There are, besides, this certain rules which have been thought to be useful in sifting the testimony of accomplices and fixing its weight. They are not of binding force as rules of law but are to assist the judgment in forming prudent conclusions, for in the end the jury must form their judgment of such testimony upon all the circumstances and facts proven before them, and the impression which all collectively produce upon their minds.

Some of the rules just referred to are, that such testimony, that is, the testimony of an accomplice, is to be taken and regarded with caution, and that it is not safe to act upon it unless it be confirmed in some material part of the witness's testimony. If it be thus confirmed, then the jury may act upon it throughout if, upon the whole, they find it worthy of credit. The situation of the witness at the time of testifying is to be regarded; whether before his own sentence, and under expectation of gain from giving the testimony, or whether he has nothing to gain from such testimony or any other circumstances which the jury may see is properly to be regarded in estimating its weight.

Two witnesses have been called to testify that Mr. Porterfield on certain occasions made statements inconsistent with his present testimony. In considering that testimony you will naturally consider, not only what was the actual admission made,

but also the circumstances and for what motive the admission or statement was made. Has the admission been correctly related? Did it go beyond a statement that he was the principal and had been the leader in wrongdoing, and that he had carried Spurr on the outside of the transactions as respects the entries in the books of the bank, or did he go further and state that Spurr had nothing whatever to do with any of the wrong things which had been done, And in considering the accuracy of the relations made by one of the witnesses who has testified you may properly consider any such zeal or interest in the obtaining of it as the testimony in your view justly warrants you in believing. If his statements then made are correctly reported, then the motive of Porterfield in making them may properly be inquired into. Did he make them, knowing that his own doom was sealed; because he was willing to shield Spurr, or did he make the statements under pressure of his conscience and because they were true? But whatever Mr. Porterfield may have said on these occasions is not to be taken as proof of the fact, but only for the purpose of affecting Porterfield's credit, and for every other purpose such statements as detailed here are mere hearsay. This distinction it is proper for the jury to understand and apply. The evidence as to what Porterfield said on the occasions to which those witnesses refer is not to be received as evidence of the facts which he may have then stated, but is only receivable and to be considered by you as evidence tending to touch the question of credit which you should give to his testimony. Whatever credit his testimony delivered here may be entitled to, the question remains for you to settle upon all the evidence whether the defendant Spurr in certifying these checks acted in good faith, and

without any intent to do that which the law forbi[ds] and which he must be presumed to know wa[s] unlawful, namely the certifying of the check as good when the maker of it has no funds in the bank to meet it. If he acted in good faith, believing that the makers of the checks had funds in the bank to pay them he should be acquitted. If he certified the checks, either knowing that the funds to respond were not in the bank and that the making of the check was unwarranted, or having in his conscience good reason for believing that such was the fact, purposely refrained from inquiry, then the charge against him is made out. The facts which are charged as constituting his guilt must be proven beyond a reasonable doubt. That is to say, so proven as to persuade a clear and abiding conviction of the defendant's guilt, such conviction as is not shaken by any reasonable doubt, grounded upon the testimony. If you are so convinced of his guilt he should be convicted, otherwise not.

I have thus presented to you what seems to the court the salient features of the case, and I now leave it to you to decide according to your convictions of the truth under the solemnity of your oaths, and that inflexible sense of duty which every right-minded juror must experience in determining an issue of such grave import to the public on the one hand and the private citizen on the other.

The jurors have in mind the dates and amounts of these several checks? Would they desire a brief abstract of them?

(By a JUROR.) And the state of the accounts at the time those checks were certified; we would like to have an abstract of that.

(By the COURT.) You can retire, gentlemen, and we will see to the sending to you, in the care of the bailiff, of these details.

ASSIGNMENTS OF ERROR.

There are twenty assignments of error. The first assignment is that there is error in a part of the following instruction:

> The checks, before their certification, were not obligations of the Commercial National Bank; they were made such by the act of the defendant in certifying them to be good; by that act this bank was estopped to deny his obligation to the other banks which held them. (*It was the defendant's duty, before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty you may draw an inference of fact that he did so inform himself if he did not already know it. But the presumption of knowledge is not an absolute one, and the defendant may show, if he can, that he did not, in fact, acquire information of the truth.*) And in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins & Dazey justified it, he is not guilty of the offense charged. Mere negligence or carelessness unaccompanied by bad faith would not render him guilty.

That part of the instruction above quoted which is inclosed in parentheses and italicized is the paragraph which constitutes the defendant's first assignment of error.

The first proposition assigned as error is that: "It was the defendant's duty, before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn."

It certainly can not be said that this is not a correct proposition of law.

Here is a national bank existing under laws of the United States that permit its organization. Its officers have in their custody large amounts of money belonging to depositors, placed there by them through their feeling of confidence that the president and all of the officers of the bank are honest and will do their duty. Can it be said, that under the law, the president of the bank can certify checks—mark them as "good," when they are not good, and when he *knows* that *he does not know* whether they are "good" or not, and then escape the penalty for so doing by merely saying "I didn't know it?" If such is the law and the court should so hold, an officer of a national bank can at all times protect himself from criminal liability by simply abstaining from inquiry before certifying checks.

The certification of the checks in this case purported on its face to be the personal act of the defendant as president of the bank, and not an act based upon information from others.

It was an *affirmative* act. He said when he marked the checks good that they were good within the meaning of the law and that Dobbins & Dazey, at the time he certified them, had the money on deposit with which to pay them. If he did not know that this was true, he knew that he did not know it, and under the law, it was his duty to know or to inform himself before he affirmatively said that he knew by certifying the checks.

The second proposition assigned as error is: "From the existence of such a duty you may draw an inference *of fact* that he did so inform himself, if he did not already know it."

It was the duty of the defendant, if he did not know as to the state of this account, to inform himself. If it was his duty to inform himself, the jury had the right to infer, not as a matter of law, but as a matter *of fact*, that he did his duty, that he did so inform himself and that he did know that the account was overdrawn when he certified the checks.

It is a principle not disputed that the law presumes every man in his private and official character does his duty until the contrary is proved. (1st Greenleaf on Evidence, section 40, Redfield's edition; Lawson's Presumption Evidence, p. 61.)

The court did not say to the jury that this inference was a presumption of law. Upon the contrary, the court said in express terms to the jury that it might draw an inference *of fact* that he did so inform himself, and the court further qualified that part of the instruction by adding, "but the presumption of knowedge is not an absolute one, and the defendant may show, if he can, that he did not, in fact, acquire information of the truth."

In the opinion rendered by Justice Swan in this case in the circuit court of appeals (reported 87 Fed. Rep., 714), commenting upon the part of the instruction last quoted, he uses this language: "This certainly deprived that presumption of any controlling influence in the minds of the jury against the defendant and emphasizes its rebuttable nature."

Presumptions *of fact* are, at best, mere arguments; but they may be allowed to prove facts even in criminal cases. (Lawson's Presumption Evidence, p. 556.)

The court did not tell the jury that the existence of such duty would raise a presumption of knowledge *which would authorize conviction*, unless defendant could rebut that presumption.

There were other facts to be proven by the Government besides the mere fact of knowledge; and if the court had said that defendant might be convicted if he merely failed to rebut the presumption of *knowledge* it would have been error.

But as knowledge was one of the facts to be proven it could be proven by inference or presumption like any other fact, and if the defendant failed to remove the inference or presumption arising from the existence of a legal duty, the jury were fully warranted in inferring that he did his duty and, therefore, that he acquired knowledge of the state of the account.

The court merely told the jury that they might infer the single fact of knowledge. It did not tell them that it might infer the fact of guilt. The fact of guilt is a fact of which knowledge is only one of the several facts.

The court did not say that the existence of the duty *creates* presumption. The court merely said that the jury was at liberty to draw an inference or argument *of fact* to that effect, if they saw proper to do so.

In the first part of the instruction of which the paragraph complained of is a part, the court told the jury that these checks, before they were certified by the defendant, were not obligations of his bank, and that they only became so by reason of his certification, and after instructing the jury upon the question of the defendant's duty, and the right of the jury to draw an inference of

fact, that he had done his duty, the court concluded the instruction by telling the jury that if the defendant, in making these certifications, acted in good faith, believing that the account of Dobbins & Dazey justified it, he was not guilty of the offense charged, and by expressly telling them that mere negligence or carelessness unaccompanied by bad faith would not render him guilty. In other words, the court said to the jury in that instruction that in order to constitute the crime there must have been "bad faith" or an intent to do wrong, and the jury, in finding the defendant guilty under that instruction, evidently believed that he had acted willfully, in bad faith, and with intent to do wrong.

Again, this case was not given to the jury to find the fact of knowledge solely upon the inference of fact that the defendant did his duty. There was other evidence in the case, both direct and circumstantial, tending to show, as a matter of fact, that the defendant did know when he certified these checks that the account of Dobbins & Dazey was overdrawn. For example: It was proven on the trial that the defendant was a very intelligent man; that he had a desk in the rear of the room where the banking business was carried on; that he was frequently among the employees of the bank; that he had before that time inquired of the teller and bookkeeper of the state of the accounts of other persons for whom he had certified checks; that there was an "overdraft ledger," of the existence of which the defendant knew, which showed each day the state of the account of every depositor of the bank, and all these facts tend to show that when the defendant certified checks drawn

by Dobbins & Dazey for large and unusual amounts as good, that he knew that the account of Dobbins & Dazey was then overdrawn.

In addition to this, the jury were explicitly instructed that the Government must establish the defendant's knowledge of the state of Dobbins & Dazey's account beyond a reasonable doubt in order to maintain any of the counts in the indictment.

SECOND ASSIGNMENT.

The second assignment is that there is error in the modification of defendant's third request for special instruction.

The instruction as given by the court is as follows:

> If you believe from the proof that at the organization of this bank the cashier was a man of experience in the details of the banking business, and that the president was without experience or special knowledge in such matters, and if you further find that in view of these facts it was then understood and agreed by the board of directors that the cashier was to have immediate charge and supervision of the details, books, accounts, and internal affairs of the bank, and that the president was to give his attention to working up custom and patronage and looking after such special matters as should be referred to him for his attention, it will be proper for you to keep in mind these facts, together with the by-laws relating to those two officers in connection with the other proof in the case bearing on the question whether the defendant had knowledge of the state of accounts of Dobbins & Dazey at the time when he certified the checks of that firm which

> are mentioned in the indictment, and give to them such weight as you think they are justly entitled to on the question whether or not the defendant did actually know the state of that account at the time he certified said check. (*But these are part only of the facts which you should consider upon the question of the defendant's knowledge; and further, this instruction is to be taken with the other instruction that actual knowledge is not necessary if the defendant purposely abstained from inquiry.*)

The error complained is that the court added to the instruction the part contained in the parentheses and italicised.

The proposition contained in the addition is that the facts set forth in the special instruction are part only of the facts which you (the jury) should consider upon the question of the defendant's knowledge.

This proposition is too well settled to be assigned as error, and it was entirely proper for the court to instruct the jury that the facts set forth in the first part of the instruction were not the *only* facts that they were to consider.

The next proposition contained in the addition made by the court to this instruction is that the instruction requested was to be taken with the other instruction that actual knowledge is not necessary if the defendant purposely abstained from inquiry.

The instruction as requested was that the jury should keep in mind certain specified facts together with by-laws and give them such weight as the jury might think they are justly entitled to "on the question whether or not the defendant *did actually* know."

The instruction as requested was erroneous. It would have been entirely proper to have refused it as a whole. The question as to whether the defendant *actually* knew was wholly immaterial.

If the defendant purposely abstained from inquiry so that *actual* knowledge could not be reputed to him, he was just as guilty as if he had *actual* knowledge. If the defendant purposely abstained from inquiring from the bookkeepers and teller, whom he knew could furnish him accurate information, and went through the farce of inquiring of Porterfield, who, he had every reason to know, would give him false information, his want of *actual* knowledge would furnish no defense. The instruction, as requested, might have led the jury to suppose that *actual* knowledge was the true test of the defendant's guilt. The court was right to tell the jury that the instruction requested was to be taken with the other instruction that *actual* knowledge is not necessary, *if the defendant purposely abstained from inquiry.*

THIRD ASSIGNMENT.

The third assignment is that there is error "in the refusal by the court of the defendant's fourth request for special instructions," which was as follows:

> If you believe from the proof that the management of the details and accounts of the bank was entrusted specially to the cashier and not to the president, and that the cashier was directed by the executive committee of the bank to look specially after the account of Dobbins & Dazey, and that it was not at any time referred to or placed in the

> hands or under the charge of the defendant, nor his attention called to it, and that he was assigned to other duties, then no inference of the defendant's knowledge of the state and condition of that account appeared on the books of the bank to be overdrawn, for knowledge of the contents of the books can not be imputed to the defendant simply because he was president or director.

This instruction was erroneous. Though the management of the details and accounts of the bank may have been intrusted specially to the cashier and not to the president; and though the cashier may have been directed by the executive committee of the bank to look specially after the account of Dobbins & Dazey; and though said account may not at any time have been referred to or placed in the hands or under the charge of defendant; and though defendant's attention may never have been called to it by the executive committee; and though defendant may have been ordinarily assigned to other duties; yet when he *assumed to certify to the affirmative fact* that the check was "good," he necessarily had his "attention" called to that account; and he necessarily assumed the duty to inform himself of the state of the account. And from the existence of such an assumed duty the jury might well draw an inference of fact that he did so inform himself.

That fact that the defendant had a desk in the directors' room in the rear end of the banking house; the fact that he had access to the books of the bank and was frequently among the clerks and bookkeepers in the front of the banking house where the books were kept; the fact that the overdrafts of Dobbins & Dazey appeared

upon the ledgers in conspicious red ink; the fact that defendant was making inquiries of the clerks and bookkeepers concerning various matters and accounts from time to time; the fact that he was a very intelligent man, and that every employee in the bank from the cashier down to the porter knew that Dobbins & Dazey's account was largely and continuously overdrawn; the fact that he knew that in the ordinary course of business the teller or bookkeeper was the person to go to when a bank officer was called upon to certify a check; the fact that instead of going to the teller or bookkeeper he went to Porterfield, with whom he had been speculating in stocks and cotton for many years and using the bank's money; the fact that he and Porterfield, at the time said checks were certified, were each speculating in cotton futures through Dobbins & Dazey without furnishing any margins, were facts, all of which should have been considered in determining whether the defendant had knowledge of the condition of Dobbins & Dazey's account; and the defendant had no right to so frame the instruction as to exclude all of those facts, and make the question of knowledge depend upon what was the proper inference to be drawn "from *the mere fact* that the account appeared on the books of the bank to be overdrawn."

Again, in considering the evidence in this case the jury had the right to consider all the facts and circumstances shown in evidence. They had a right to take into consideration the relation of the defendant to the bank as its president; they had the right to consider the nature of his duties; they had a right to consider all

that he did and said, so far as it tended to throw any light upon the question as to what the defendant's knowledge actually was.

This instruction is so framed that it takes away from the jury the right to take into consideration the relation of the defendant to the bank or to consider what he did and said, but instead, the effect of the instruction was to find the question as to what was the proper inference to be drawn from the *mere fact* that the account appeared on the books of the bank to be overdrawn.

The jury had the right to consider the fact that there was an overdraft appearing upon the books of the bank as affording some ground of presumption that the president had knowledge of it.

This instruction took away from the jury that right and confined the question as to what was the proper inference to be drawn from the *mere fact* that the account of Dobbins & Dazey appeared on the books of the bank to be overdrawn, and would have misled the jury into believing that they had no right to take into consideration *all* the facts and circumstances shown at the trial.

The proposition contained in this instruction to the effect that "knowledge of the contents of the books can not be *imputed* to the defendant *simply because he was president or director*" might have been correct, if it had stood alone, and such a proposition might possibly have been given by the court to the jury. But as that proposition was coupled in the same instruction with another proposition which was clearly erroneous, the court was justified in refusing to give the instruction as an entirety. An instruction, if bad in part, is bad altogether.

FOURTH ASSIGNMENT.

The fourth assignment is that there is error "in the refusal by the court of defendant's sixth request for special instruction," which was as follows:

> It is incumbent on the Government to prove to your satisfaction, beyond a reasonable doubt, that at the time the defendant certified the check mentioned in the indictment he *actually* knew that Dobbins & Dazey did not have on deposit in the bank funds and credits sufficient in amount to cover the check certified by him. It is not sufficient for the Government to show that it was the defendant's duty to know this fact, and that he *neglected it;* nor that he could have known or ascertained the fact by inquiry of the clerks or by examination of the books; nor that he was *careless or negligent* or overconfident in the correct management of the accounts by the cashier; nor that he had the opportunity to know the facts and *failed to avail himself of it;* but it must appear by the proof, beyond a reasonable doubt, that he did *actually* know, at the time he certified the checks, that sufficient funds were not on deposit to meet the checks, and that he certified them willfully and with such knowledge.

The court, in refusing the instruction, indorsed upon it that it was "declined except as given in other instructions."

The first proposition in this instruction is that it is incumbent on the Government to prove the facts in issue to the satisfaction of the jury "*beyond a reasonable doubt.*"

That proposition was given by the court to the jury in

the fifteenth special instruction asked for by the defendant, and granted, as follows:

> The law presumes the defendant to be innocent, and this presumption stands as an all-sufficient witness in his favor until the Government establishes his guilt by competent proof to your satisfaction beyond a reasonable doubt.

It would not be possible to instruct the jury in plainer language that the Government must make out a case to the satisfaction of the jury "beyond a reasonable doubt."

It was not necessary to repeat this instruction.

The second proposition is one which is twice expressed in the instruction.

It is first expressed at the commencement of the instruction, as follows:

> It is incumbent on the Government to prove to your satisfaction beyond a reasonable doubt that at the time defendant certified the checks mentioned in the indictment he *actually* knew that Dobbins & Dazey did not have on deposit in the bank funds and credits sufficient in amount to cover the checks certified by him.

The same proposition is again expressed at the close of the instruction, as follows:

> But it must appear by the proof, beyond a reasonable doubt, that he did *actually* know, at the time he certified the checks, that sufficient funds were not on deposit to meet the checks, and that he certified them willfully and with such knowledge.

The proposition, whether as expressed at the commencement or at the close of the instruction, is erroneous, and should not have been given for the reason that it, in fact,

instructs the jury that it is necessary for the Government to prove *actual* knowledge.

Suppose the defendant did not have *actual* knowledge. Yet, if it was proven beyond a reasonable doubt that defendant "willfully, designedly, and in bad faith shut his eyes to the fact and purposely refrained from the inquiry or investigation for the purpose of avoiding knowledge," he was just as guilty as though he had *actual* knowledge of the fact.

The defendant, in offering to the court the eighth special instruction, in effect conceded that *actual* knowledge is not required. In that instruction the jury are told in substance that the Government need not prove *actual* knowledge, provided it could prove that the defendant willfully shut his eyes for the purpose of avoiding knowledge.

The court gave the eighth special instruction asked by defendant, with the addition by the court of the words in parentheses, as follows:

> (8) If the proof fails to satisfy to your minds clearly and beyond a reasonable doubt that the defendant did *actually* know at the time he certified the checks mentioned in the indictment that Dobbins & Dazey did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, *unless* you are convinced by the proof beyond a reasonable doubt that he willfully, designedly and in bad faith (these words mean substantially the same thing) shut his eyes to the fact and purposely refrained from the inquiry or investigation for the purpose of avoiding knowledge.

The entire instruction except the words in parentheses, is in the language of defendant's counsel.

The court gave to the jury this instruction asked for by defendant which stated the law correctly, and, therefore, declined to give the sixth special instruction, which contained the erroneous proposition that the Government was bound to prove *actual* knowledge.

The third proposition expressed in the instruction is that—

> It is not sufficient for the Government to show that it was the defendant's duty to know this fact (*i. e.*, the fact that Dobbins & Dazey did not have on deposit sufficient funds, etc.), and that he *neglected* it; nor that he could have known or ascertained the fact by inquiry of the clerks or by examination of the books; nor that he was *careless or negligent* or overconfident in the correct management of the account by the cashier; nor that he had the opportunity to know the fact and failed to avail himself of it.

The only object of this proposition in the instruction was to instruct the jury that mere negligence or carelessness would not render the defendant guilty. The court gave the jury such instruction in the general charge as follows:

> And in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins & Dazey justified it, he is not guilty of the offense charged. *Mere negligence or carelessness unaccompanied by bad faith would not render him guilty.*

The court, in the eighth special instruction above quoted, told the jury that the proof must satisfy their minds clearly and beyond a reasonable doubt, either that

the defendant actually knew or that he willfully, designedly and in bad faith shut his eyes to the fact for the purpose of avoiding knowledge. It was, therefore, wholly unnecessary for the court to say that it was not sufficient for the Government to prove "mere negligence or carelessness;" because mere negligence or carelessness is neither actual knowledge nor the willful avoidance of knowledge.

The third proposition might, therefore, have been rejected as mere surplusage; but as shown above it was given in the general charge of the court to the jury.

FIFTH ASSIGNMENT.

The fifth assignment is that there is error "in the modification of defendant's second request for special instructions by the addition of the words inclosed in parentheses at the end thereof," said special instruction, as so modified and given, being as follows:

> 2. Certain by-laws of this bank have been put in evidence before you, relating to the duties and responsibilities of the cashier and president, and these by-laws, being numbers 8 and 9, having been read and commented on in the argument, I instruct you that the former, relating to the duties and responsibilities of the cashier, means that he, the cashier, shall be responsible generally for all the moneys, funds and valuables of the bank, and requires him to faithfully apply and account for all its moneys, funds and valuables, and that he is primarily charged with the faithful keeping and accounting for the same. The latter, relating to the duties and responsibilities of the president, means that he is to

be held responsible only for such sums of money and property of the bank as may be entrusted to his care or placed in his hands by the board of directors, or by the cashier, or which may otherwise come into his hands as president, and that he is to be responsible only for such sums of money and property as may be placed or come into his hands, and is to faithfully and honestly apply and account for the same and otherwise faithfully discharge his duties as president. These two by-laws, taken together, mean and imply that the cashier is primarily responsible for all the funds, property, and valuables of the bank, and that the president is responsible only for such funds, property, and valuables of the bank as may be placed in his hands as president, and that both of these officers are each to faithfully and honestly discharge their respective duties. (But I further charge you that the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding those by-laws, to certify checks, and when the president assumed to certify these checks as good, the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn.)

The modification added by the court to the instruction was eminently proper.

In fact, the instruction as an entirety was irrelevant, misleading, and might have been properly declined by the court as a whole.

As the Government did not pretend that any of the moneys, funds, property, or valuables of the bank, connected with the account of Dobbins & Dazey, had ever been placed in the defendant's hands as president, it

was wholly irrelevant to go into a lecture before the jury as to what were the responsibilities of the president of a national bank for moneys, funds, property, or valuables of the bank placed in his hands; and yet the instruction as presented to the court contained practically nothing except a discussion as to what were the relative duties and responsibilities of the cashier and president, respectively, with reference *to moneys, funds, property, and valuables of the bank.* The instruction, as presented to the court, was careful to state, at least three times, that the president was to be held responsible *only for such sums of money, funds, property, and valuables of the bank* as may be placed in his hands as president; and the jury might very properly have inferred, from the language of the instruction, that as none of the moneys, funds, property, or valuables of the bank had been placed in the defendant's hands in connection with the Dobbins & Dazey account, he was not responsible for the certification of their checks, although he may have actually known that they had no money on deposit to meet the checks.

The jury, in discussing the matter among themselves, might well have argued it thus: "There is no proof that any of the moneys, funds, property, or valuables of the bank connected with the account of Dobbins & Dazey were ever placed in the defendant's hands as president, and the court has instructed us that he 'is responsible *only for such funds, property, and valuables of the bank* as may be placed in his hands as president;' and therefore, we are bound to find the defendant not guilty."

The court, however, instead of refusing the instruction, as it might well have done, saw proper to give it to the jury; but in doing so, added at the foot of it the language inclosed in parentheses. The instruction, as presented to the court, conceded that the defendant was bound "to faithfully and honestly discharge his duties as president;" and the court in effect added to the instruction that "the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding those by-laws, to certify checks, and when the president assumed to certify these checks as good the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn."

The defendant in certifying the checks certified to an affirmative fact. He had full knowledge that by so doing he would make the bank liable. It was his duty to the bank, to its stockholders and to its creditors, if he did not already know, to inform himself in regard to the important fact of the condition of the account before he assumed to certify to it over his own signature.

To hold as contended for by the defendant in this case, would be to hold that the duties of the president of a national bank do not require him to be informed of the condition of the account on which checks are drawn. Such a doctrine would be a dangerous one. Under it officers of national banks could abstain from inquiry before certifying checks, and they could protect themselves by the pretense of applying for information to some person whom they knew, or had every reason to believe, would give them false information.

In this instruction the court does not tell the jury that the faithful and honest discharge of his duty required him to be *correctly* informed of the condition of the account. He may have looked at the ledger himself and made an honest mistake. He may have inquired of the teller or bookkeeper and they may have been honestly mistaken in their representation to him, or they may have falsely, fraudulently misstated the condition of the account to him. In either case the defendant would have been *informed* of the condition of the account.

The court did not tell the jury, and the jury could not have understood the court to mean, that the defendant would be criminally liable because he acted upon false information, provided he did not have some reason to believe the information was, in fact, false.

All that the court intended and all that the jury understood that the court intended by the addition to this instruction was that notwithstanding the *by-laws* of the bank, taken by themselves, may hold a president responsible *only for such sums of money, funds, property, and valuables of the bank as may be placed in his hands* as president; yet the *general law* imposed the duty upon him before he certified that a check was good, to be informed in good faith (whether his information was correct or not) as to the condition of the account.

SIXTH ASSIGNMENT.

The sixth assignment is that there is error in the following language of the charge of the court to the jury:

> The Government is bound, in order to maintain any of the counts in these indictments, to prove:
> First. That the defendant certified the check.

> Second. That the drawers of the check had not sufficient funds in the bank to meet such check.
>
> Third. That the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offense charged will be explained and its modification stated further on.

The construction which defendant's counsel seek to put upon the language of the charge quoted in this assignment is, first, that the court did not explain the last paragraph of the charge as promised, and second, that the court, in giving this part of the charge, told the jury, in effect, that the establishment of three facts *would authorize conviction.*

The court did not say, and did not even intimate to the jury, nor could the jury have understood, that the establishment of three facts *would authorize conviction.*

The court did say that the Government was bound to prove these three facts, but it did not intimate *that they were the only facts* that the Government would have to prove in order to authorize a conviction.

The language of the charge quoted in this assignment did not stand alone. The court did explain in the general charge to the jury what was meant by the last paragraph of this quotation, and expressly told the jury that there were other facts to be proven before a conviction would be authorized. Upon this question the court told the jury that—

> The Government is bound in order to maintain any of the counts in these indictments to prove:
>
> First. That the defendant certified the check.
>
> Second. That the drawers of the check had not sufficient funds in the bank to meet such check.

Third. That the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offense charged will be explained and its modification stated further on.

Taking this evidence up in detail, it is not denied that the defendant certified these checks, and, secondly, that the account of the drawers was overdrawn when these certifications took place; but, third, the defendant asserts that he was not cognizant of the fact that the account of the drawers was overdrawn at the time of his certification of the checks.

The knowledge of the defendant of the state of Dobbins & Dazey's account when he certified the checks is thus made the pivotal question in the case.

The court also told the jury that—

If the proof fails to satisfy to your minds clearly and beyond a reasonable doubt that the defendant did actually know at the time he certified the checks mentioned in the indictment that Dobbins & Dazey did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he willfully, designedly, and in bad faith (these words mean substantially the same thing) shut his eyes to the fact, and purposely refrained from the inquiry or investigation for the purpose of avoiding knowledge.

The court also said to the jury:

And, in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins & Dazey justified it, he is not guilty of the offense charged. Mere negligence or carelessness, unaccompanied by bad faith, would not render him guilty.

The court also said to the jury:

If you find from the proof that the defendant relied upon the statements and representations of the cashier as to the condition of the account of Dobbins & Dazey, and that he did so in good faith, believing those statements and representations to be true, and such statements were made at or so near the time of the certification as to be fairly regarded as indicating the present state of the account, his certification, made in honest reliance upon them, would not be criminal; and if the cashier was reputed to be, and believed by the defendant to be, a man of honesty and right conduct as respects the affairs of the bank, the defendant would have the right to rely upon his statements in regard to that account.

The court also said to the jury:

If you find from the proof that the account of Dobbins & Dazey upon the books of the bank was overdrawn continuously during the period covered by the dates of the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft, and that he certified the several checks mentioned in the indictment, believing at the time that the exchange deposited by Dobbins & Dazey on the days upon which said checks were certified were sufficient, or more than sufficient, to cover the amount of said checks, besides the overdrafts already existing, then he is not guilty and you should acquit him, unless such ignorance of the overdrafts was willful, as elsewhere explained in the court's instructions.

The court also said to the jury:

The fact that the cashier had bought and sold stocks and bonds on cotton futures, and that the defendant knew the fact, would not establish or imply that he was personally dishonest nor deprive the

defendant of the right to rely upon his statements in respect to the affairs of the bank, unless he also knew or had reason to believe that the cashier had been using the funds or credits of the bank instead of his own in such transactions. In order to deprive the defendant of the right to rely upon the cashier it must be shown beyond a reasonable doubt that the cashier was unfaithful to the bank and was acting unlawfully in respect to its affairs.

The court also said to the jury:

The defendant is not on trial directly for his complicity with such previous speculations and misuse of the bank's property in them, and proof of them has been admitted, and is to be applied by the jury solely upon the question of knowledge and intent of the respondent when he made the false certifications of the checks mentioned in the indictment.

It will be seen from these extracts that the court did explain the last paragraph complained of in this assignment and that it did not tell the jury that the establishment by the Government of these three facts *would authorize conviction.*

SEVENTH ASSIGNMENT.

The seventh assignment is that there is error "in the modification of defendant's fifth request for special instructions, by the interlineation of the words inclosed in parentheses, namely, 'Besides the overdraft then existing,'" which special instruction, as so modified, was as follows:

If you will find from the proof that the account of Dobbins & Dazey upon the books of the bank

was overdrawn continuously during the period covered by the checks certified by the defendant and that the defendant was in fact ignorant of such overdraft; and that he certified the several checks mentioned in the indictment believing at the time that the exchange deposited by Dobbins & Dazey on the days upon which said checks were certified was sufficient to cover the amount of said checks (besides the overdraft then existing), then he is not guilty, and you should acquit him, unless such ignorance of the overdraft was willful, as elsewhere explained in the court's instructions.

The modification inserted by the court in the instruction was exactly right.

The action of a *nisi prius* court in dealing with carefully prepared and ingeniously worded requests for special instructions can not be properly judged of by an appellate tribunal without taking into full consideration all of the facts and circumstances of the trial as they appeared to the *nisi prius* court.

A request for a special instruction may present a proposition of law, which viewed abstractly, is entirely correct; and yet it may be wholly irrelevant to the facts of the particular case, and if it should be incorporated in the charge, its effect would be to confuse and mislead the jury.

So, in a case like this, where the facts are numerous and complicated, a request for a special instruction may ingeniously single out a few isolated facts, and present a hypothesis based upon them, which would be entirely correct if those facts stood alone; and yet, by giving undue prominence to the facts thus ingeniously selected,

and at the same time ignoring all of the other facts in the case, a request submitting such an hypothesis to the jury would be positively misleading.

As an appellate tribunal can never see a case exactly as it was tried in the *nisi prius* court, it must necessarily place great reliance upon the good sense and judgment of that court.

While it is impossible for this court to see this case exactly as it was tried below, there is enough in the record to show that one of the facts which was greatly relied upon by the defendant in that court was the fact that on the day that "each of the checks mentioned in the indictment, except that of December 17, 1892, was certified by the defendant, there was deposited in the bank by Dobbins & Dazey, in New York exchange or drafts, a sum more than sufficient to cover the check certified on that day, although not sufficient to cover both the check and the overdraft then existing on the books of the bank, as shown by the individual ledger on the morning of that day."

It will be noticed that the instruction as presented to the court ingeniously excluded from the hypothesis which it contained, all reference to the rule of law which requires that the exchange deposited by Dobbins & Dazey on the days when the respective checks were certified, be first appropriated to the absorption of the overdrafts which appeared on the account at the commencement of business on those days. And if the court had given the instruction just as it was presented, and without reminding the jury of the rule of law which requires that the exchange deposited be first appropriated

to the absorption of the existing overdrafts, there would have been imminent danger of the jury construing the instruction as though its entire substance was contained in the concluding part of it, wherein it was said that if the defendant "certified the several checks, mentioned in the indictment, believing at the time that the exchange deposited by Dobbins & Dazey on the days upon which said checks were certified was sufficient to cover the amount of said checks, then he is not guilty, unless such ignorance of the overdraft was willful, as elsewhere explained in the court's instructions."

It is true, that in the first clause of the instruction the hypothesis supposes "that the defendant was in fact ignorant" of the existing overdraft; but the court below could not shut its eyes to the fact that there was a very great deal of evidence to show that the defendant was not ignorant of the overdraft; and it would have been a great oversight if the court had given the hypothetical instruction without reminding the jury of the rule of law which requires that the exchange deposited be first appropriated to the absorption of the overdraft.

If the defendant's real object had been to get an instruction as to the legal effect of the fact that he was ignorant of the overdrafts, he should have confined the instruction to the first clause of it, which is as follows:

> If you find from the proof that the account of Dobbins & Dazey upon the books of the bank was overdrawn continuously during the period covered by the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft, * * * then he is not guilty, and you

should acquit him, unless such ignorance of the overdraft was willful, as elsewhere explained in the court's instructions.

If the defendant was in fact ignorant of the overdraft, and if his ignorance was not willful, he was entitled to an acquittal without the slightest reference to whether the exchange deposited was sufficient to cover the certified checks or not. The reference contained in the instruction to the question as to whether the exchange deposited was sufficient to cover the certified checks was wholly irrelevant and misleading; and the court readily detected that if it submitted the irrelevant part of the hypothesis, without mentioning the existing overdraft, the jury might, and probably would be misled into basing their verdict on the fact that the exchange deposited equaled the checks certified; without remembering that the exchange deposited must in law be first applied to the absorption of the existing overdraft.

The ingenuity displayed in the instruction as originally presented, consisted in the attempt to make the words "*the amount of said checks*" dominate the entire instruction; so that if the jury happened to find that the exchange deposited was sufficient to cover "the amount of said checks," they would acquit the defendant; even though the jury were of opinion that the defendant knew of the existence of the overdraft.

The court had distinctly told the jury that—

> If the proof fails to satisfy to your minds clearly and beyond a reasonable doubt that the defendant did actually know at the time he certified the checks mentioned in the indictment that Dobbins & Dazey

did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof, beyond a reasonable doubt that he willfully, designedly, and in bad faith (these words mean substantially the same thing) shut his eyes to the fact, and purposely refrained from the inquiry or investigation for the purpose of avoiding knowledge.

This was a full and fair statement of the law so far as it related to defendant's ignorance of the overdraft, and it was as favorable a statement as he could well have asked.

As the court had thus given him the full benefit of that proposition, he had no right to involve the same proposition in a special instruction so drawn as to be calculated to mislead the jury into believing that he was entitled to be acquitted, if the exchange deposited was sufficient to "*cover the amount of said check*," notwithstanding it was insufficient to cover the existing overdraft.

The modificaton made by the court in the instruction was correct for another reason:

The instruction as presented to the court proceeded upon the theory that if defendant was in fact ignorant of the overdraft, and he certified the checks believing at the time that the exchange deposited by Dobbins & Dazey on the days upon which the respective checks were certified was sufficient to cover the amount of said checks, then he was not guilty.

Section 5208 of the United States Revised Statutes declares it to be unlawful to certify a check unless the

drawer "has on deposit" at the time such check is certified "an amount of money equal to the amount specified in such check."

The act of Congress of July 2, 1882 (see acts 1881–82, chap. 290, p. 162), prohibits the certification of a check "before the amount thereof shall have been regularly entered to the credit of the dealer upon the books" of the bank.

The mere fact that Dobbins & Dazey may have brought into the Commercial Banking House certain New York exchange and delivered it to the teller did not in law constitute "a deposit." It did not in contemplation of law become a deposit until the exchange "had been regularly entered" to their credit on the books of the bank; and the moment that the exchange was entered to their credit on the books the law instantly appropriated it to the absorption of the existing overdrafts; and if the overdrafts exceeded the exchange, Dobbins & Dazey would have had no money at all on deposit, notwithstanding they may have handed the exchange to the teller not five minutes before.

To illustrate: When the bank opened on the morning of December 9, 1892, Dobbins & Dazey's account was overdrawn $114,194.01. They deposited that day, in "kiting" drafts on New York, $50,153.30. The very instant that those drafts were entered to their credit upon the books of the bank they were appropriated to the absorption, pro tanto, of the overdrafts; and five minutes afterwards, instead of their having the amount of said drafts "on deposit" to their credit, they were indebted to the bank $64,040.71.

On that day the defendant certified their check for $15,000.

Now assume (though only for the sake of argument) that at the opening of the bank on the morning of December 9, 1892, the defendant was wholly ignorant of the fact that Dobbins & Dazey's account was overdrawn

Assume also that he was standing by and saw Dobbins & Dazey when they handed the $50,153.30 of drafts to the teller, would he have been justified, either legally or morally, in certifying their check for $15,000 before the drafts were entered to their credit on the books of the bank? Certainly not.

Because, even though he may have been ignorant of the fact that there *was* an overdraft he surely knew *that there might be an overdraft;* and he was bound to know, as a matter of law, that if there was an overdraft in excess of the "kiting" drafts, Dobbins & Dazey would not have anything at all "on deposit."

The defendant knew that when Dobbins & Dazey first placed their account with the bank the executive committee, and the defendant, who was a member of that committee, understood that the business of Dobbins & Dazey was one of great magnitude. The defendant also knew that Mr. Dudley, one of said committee, objected to the account on the ground that, having been in the cotton business himself, he (Dudley) "*believed they would be likely to overdraw their account.*"

The defendant also knew, when the account was finally taken, that the cashier was directed by the committee, and in defendant's presence, not to allow Dobbins & Dazey to overdraw their account.

The defendant also knew that four of the checks certified by him varied in amounts from $11,724.89 to $40,000.

He could not recollect that he had ever certified a check for anyone, except Dobbins & Dazey, for as much as $10,000.

And, with only one exception, every check of Dobbins & Dazey certified by the defendant, was larger than the largest check of any other person that was certified by said bank during the entire period from July 11, 1890, to the failure of the bank in March, 1893.

When we consider that the defendant knew of the great magnitude of the business of Dobbins & Dazey; that he knew of the liability of all cotton houses to overdraw in bank; that he knew that special orders were given to the cashier not to allow Dobbins & Dazey to overdraw their account; that he heard soon after their account was taken at the bank that it was overdrawn, though afterwards made good; and that he knew that the checks of Dobbins & Dazey certified by him were for enormous amounts as compared with ordinary checks on the bank; it is impossible to believe that he was either legally or morally justified in certifying their checks, merely because he may have seen or heard of certain "kiting" drafts being handed into the teller by them, without his ever undertaking to inform himself as to how their account would stand after those drafts should have been entered to the credit of Dobbins & Dazey on the books of the bank. And yet that is in substance what the court was asked to tell the jury in the instruction, the modification of which is complained of in this assignment.

EIGHTH ASSIGNMENT.

The eighth assignment is that there is error "in the refusal of the defendant's seventh request for special instructions," which was as follows:

> If you find from the proof that the defendant believed and understood at the time the account of Dobbins & Dazey was taken and during its existence at the Commercial National Bank that they were engaged in the purchase of cotton and its shipment to New York and other Eastern points; that they had numerous branch offices and agencies in various States of the South, where the cotton was purchased; that the Nashville office was the parent office of the firm, upon which drafts were drawn by the branches and agents at other points for the payment of the cotton so purchased, accompanied with bills of lading; that the payment of these drafts drawn upon the parent house required large amounts of money; that to provide such funds the parent house expected to deposit and that they were depositing to their credit in the Commercial National Bank drafts on their correspondents in New York, secured by bills of lading for cotton, and then drawing their checks on the Commercial National Bank against such deposits; and that their deposits were expected to consist, and did consist, mainly of such New York drafts; if you believe from the proof that the defendant understood and believed that this course of business was to be and was, in fact, being pursued by Dobbins & Dazey at Nashville, and that the volume of such business would be large and likely to require the sale of exchange by the bank in order to keep supplied in cash funds, and the defendant had no knowledge at the time he certified the checks mentioned in the

indictment that Dobbins & Dazey, instead of conducting a legitimate business in this way, were wiring money to New York through another bank in order to sustain the system of "kiting" as developed by the proof on this trial, and that, having no knowledge of the overdraft of Dobbins & Dazey's account in the bank, the defendant had in mind the course of business as he understood it to be, and supposed they were making such daily deposits of New York exchange and then drawing against them, and (that in each instance where he certified a check he had information from the cashier or exchange clerk upon which he relied in good faith that a sufficient amount had been deposited that day, and was in bank, to cover the check certified, he would not be guilty under the indictment, and you should acquit him).

The latter part of this instruction which is inclosed in parentheses was modified by the court and given to the jury, and the action of the court in modifying that part of the instruction and giving it to the jury, is made the basis of the ninth assignment of errors, which will be discussed hereafter.

The error complained of in this assignment is that the court refused all of the instruction except that part inclosed in parentheses.

The court declined to give the main part of the instruction, indorsing thereon as follows: "Declined. The main part of this request is a recital of part of the evidence only, and is argumentative. The latter part is correct and is given."

The main part of this instruction which was refused by the court ignores all the proof offered by the Govern-

ment, and calls the attention of the jury only to the strong features in the defendant's favor.

The defendant might as well have had his testimony printed and submitted to the jury and then have asked the court to instruct the jury that if they believed the defendant's testimony (without reference to all of the other evidence in the case), or if they believed the argument of the defendant's counsel, they should acquit him.

NINTH ASSIGNMENT.

The ninth assignment is that the court erred in modifying that part of the instruction discussed in the eighth assignment inclosed in parentheses and giving it to the jury.

As modified, the instruction given was as follows:

> (If you find) that in each instance where he certified a check the defendant had information from the cashier or exchange clerk, upon which he relied in good faith that a sufficient amount had been deposited that day and was in the bank, to cover the check certified, (I add, in addition to the existing overdraft), he would not be guilty under the indictment, and you should acquit him.

It will be noticed that the modification in this instruction is identical with the modification made by the court in the defendant's fifth request for special instruction and complained of in the seventh assignment of errors. This modification has been fully considered and discussed in the comments of this brief upon the seventh assignment of errors.

The language used by the defendant in this request was well calculated to make the words "*cover the checks*

certified" dominate the entire instruction, so that if the jury should happen to find that defendant had information from the cashier or exchange clerk upon which he relied in good faith, that a sufficient amount had been deposited that day and was in the bank *"to cover the check certified,"* they would acquit the defendant even if the jury believed that the defendant knew of the overdraft.

TENTH ASSIGNMENT.

The tenth assignment is, that there is error in the refusal of defendant's ninth request for special instructions, in connection with the eighth, which was given, which ninth request was as follows:

> (9) The defendant's want of knowledge of the state of the account of Dobbins & Dazey at the time he certified checks, will be a complete defense to him, unless you are satisfied beyond a reasonable doubt, that such want of knowledge proceeded *from a will to disobey the law, or from an indifference to its commands.*

The court refused this instruction, indorsing on it: "Declined, as liable to mislead as to the character of the purpose."

The court had already, in effect, instructed the jury upon this point.

The eighth special instruction, asked by defendant, and granted, with the addition by the court of the words in parentheses was as follows:

> (8) If the proof fails to satisfy to your minds clearly and beyond a reasonable doubt that the defendant did actually know at the time he certified the checks mentioned in the indictment that Dobbins

> & Dazey did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he *willfully, designedly, and in bad faith (these words mean substantially the same thing) shut his eyes to the fact and purposely refrained from the inquiry or investigation for the purpose of avoiding knowledge.*

The court, at the defendant's request, used the phrase "willfully, designedly and in bad faith shut his eyes to the fact, and purposely refrained from the inquiry or investigation for the purpose of avoiding knowledge;" the court was not bound to repeat the same idea in the equivalent phrase "proceeded from a will to disobey the statute or from an indifference to its commands."

While the court was not bound to do so, it did in effect, repeat the same idea in another part of the charge in discussing the question as to the credit to which the testimony of Porterfield was entitled. He said:

> Whatever credit his testimony delivered here may be entitled to, the question remains with you to settle upon all the evidence, whether the defendant Spurr, in certifying these checks, acted in good faith, *and without any attempt to do that which the law forbids*, etc.

The instruction asked for had been substantially given. It was not an error to refuse it.

ELEVENTH ASSIGNMENT.

The eleventh assignment is, that there is error

> in the action of the court in responding to a question of the jury on their return into court after being charged, in reading twice section 5208 of the

Revised Statutes, and in failing to read and explain the act of Congress of 1882, on which the indictment is based, in response to the jury's question, and in the further instructions of the court in that connection, which were not called for by the jury—which question, action of the court thereon, and further instructions, were as follows:

The jury came into court and asked the following question, which was written out in pencil and handed to the court: "We want the law as to the certification of checks, when no money appeared to the credit of the drawer."

The COURT. The jury state they want the law as to the certification of a check when there is no money to the credit of the drawer. I can not better answer this question, which the jury has put to the court, than by reading the section of the Revised Statutes which relates to that subject:

"It shall be unlawful for any officer, clerk, or agent of any national banking association, to certify any check drawn upon the association, unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check."

The COURT: Does this answer your question?

FOREMAN OF THE JURY: Yes, sir.

The COURT: I read it again, so that you may all understand it. (Court reads that part of section 5208, Revised Statutes, as quoted.)

The COURT. Is that all, gentlemen? The $30,000 was the credit allowed, and these overdrafts, as the court understands from the testimony in the case, were in excess of that. The account of Dobbins & Dazey—the overdrafts—were in excess of the amount which Dobbins & Dazey had as a limit or line of credit.

> I charge you, *in addition to the instructions I gave you this morning*, that a check drawn upon a bank where the drawer has no funds, creates no obligation against the bank, and it does not create any obligation until it is certified as good by an officer of the bank, and that makes the check good as to the holder of it, and the bank then becomes estopped, although there was no warrant for the drawing of the check, as against the bona fide holder. So that, the obligation of the bank to meet it is made so by the act of the officer who certifies it to be good. *That is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there are no funds there to meet it.*

There is omitted from this assignment the material fact, that at the conclusion of the judge's response to the jury's request, he said, "You understand what I have said now *is to be taken in connection with what I have before instructed you.*"

The jury asked for "the law as to the certification of checks when no money appeared to the credit of the drawer." The court said, very properly, that it could not better answer the question, than by reading the section of the Revised Statutes which relates to the subject.

The Court having read the section to the jury, the following colloquy occurred:

> The COURT: Does this answer your question?
> FOREMAN OF THE JURY: Yes, sir.
> The COURT: I read again, so that you may all understand it.

It is seriously argued, in effect, that the jury did not know the meaning of the question which they had asked; that the court did not know how to answer the question

that had been asked; and that the jury did not know whether the answer which the court gave was an answer to the question which they had asked. If ignorance, both upon the part of the jury and the part of the court, is to be presumed, how are the proceedings of any nisi prius court to be upheld in an appellate tribunal?

In order that there should be no doubt as to whether the reading of the statute gave to the jury "the law as to the certification of checks," which was the only law that the jury desired to know, the court asked the jury if the reading of the section had answered their question; and the jury replied in the affirmative.

The jury did not ask for the law "prescribing the penalty for false certification," because it was no part of their function to fix the penalty. The court therefore properly declined to read that law to them.

The jury had been fully instructed in the main charge, as to the meaning and effect of the word "willful" as used in the act of 1882; and, in the remarks made by the court to the jury when they asked for "the law as to the certification of checks," the court was careful to state specifically that "*what I have said now is to be taken in connection with what I have before instructed you.*"

It is impossible for the jury to have supposed that the court, on the occasion referred to, intended to instruct that "the mere certifying by an officer of the bank, when there are no funds there to meet it," constituted an offense under the statute; when the court expressly told the jury that those words were to be taken in connection with the main charge, in which the court had fully explained the meaning and effect of the word "willful."

The court had used the word "willfully," and had instructed the jury that the certification of the checks must have been done willfully, designedly, and in bad faith.

The eighth special instruction, asked by defendant, and granted, with the addition by the court of the words in parentheses, is as follows:

> (3) If the proof fails to satisfy to your mind clearly and beyond a reasonable doubt that the defendant did actually know *at the time he certified the checks mentioned in the indictment* that Dobbins & Dazey did not have on deposit in the bank sufficient funds and credits *to meet the checks so certified*, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he *willfully, designedly, and in bad faith* (*these words mean substantially the same thing*) shut his eyes to the fact and purposely refrained from the inquiry or investigation for the purpose of avoiding knowledge.

The court also said to the jury:

> If you find from the proof that the account of Dobbins & Dazey upon the books of the bank was overdrawn continuously during the period covered by the dates of *the checks certified by the defendant*, and that the defendant was in fact ignorant of such overdraft; *and that he certified the several checks* mentioned in the indictment, believing at the time that the exchange deposited by Dobbins & Dazey on the days upon which *said checks were certified* was sufficient, or more than sufficient, to cover the amount of said checks, besides the overdrafts already existing, then he is not guilty, and you should acquit him, unless such ignorance of the overdrafts was *willful*, as elsewhere explained in the court's instructions.

It will be seen that the court twice used the word "willful;" and used it as applied to "the false certification of checks."

It will also be seen that the court explained to the jury that the word "willfully" means substantially the same as "designedly and in bad faith."

In the Potter Case the Supreme Court said that the word "willful" implies two things:

> First: "Knowledge."
>
> Second: "A purpose to do wrong;" i. e., "a bad purpose," "a bad intent," "an evil intent." (155 U. S., p. 446, *U. S.* v. *Potter*.)

First, as to "*knowledge:*" The court in this case instructed the jury as follows:

> The Government is bound, in order to maintain any of the counts in these indictments, to prove:
>
> First. That the defendant certified the checks.
>
> Second. That the drawers of the checks had not sufficient funds in the bank to meet such checks.
>
> Third. That the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offense charged will be explained and its modifications stated further on.
>
> Taking this evidence up in detail, it is not denied that the defendant certified these checks; and, secondly, that the account of the drawer was overdrawn when these certifications took place; but, third, the defendant asserts that he was not cognizant of the fact that the account of the drawers was overdrawn at the time of his certification of the checks.
>
> *The knowledge of the defendant* of the state of Dobbins & Dazey's account when he certified the checks is thus made the pivotal question in the case.

Again the court said:

> In determining these questions you are to look to all the evidence bearing upon his *knowledge* and give all its just effect.

Again the court said to the jury:

> It will be proper for you to keep in mind these facts, together with the by-laws relating to those two officers, in connection with the other proof in the case, bearing on the question *whether the defendant had knowledge* of the state of the account of Dobbins & Dazey at the time when he certified the checks of that firm which are mentioned in the indictment, and give to them such weight as you think they are justly entitled to on the question whether or not the defendant *did actually know* of the state of that account at the time he certified said checks.

Again the court said:

> If you find beyond a reasonable doubt that the defendant *did know* of the unlawful use of the bank's funds by the cashier, as before indicated, that fact would not of itself establish the defendant's guilt in this case, but would only be a circumstance to be considered by you in connection with the other evidence on the question *whether the defendant knew*, or was charged with *knowing* because he purposely abstained from knowledge, at the time of certifying the checks mentioned in the indictment, that Dobbins & Dazey did not have funds and credits on deposit in the bank sufficient to meet those checks.

Second. As to the "*purpose to do wrong*," the court said:

> And, in general, if the defendant acted in *good faith* in making these certifications, believing that

the state of the account of Dobbins & Dazey justified it, he is not guilty of the offense charged. Mere negligence or carelessness unaccompanied by *bad faith* would not render him guilty.

Again, the court said:

If you find from the proof that the defendant relied upon the statements and representations of the cashier as to the condition of the account of Dobbins & Dazey, and that he did so *in good faith*, believing those statements and representations to be true, and such statements were made at or so near the time of the certification as to be fairly regarded as indicating the present state of the account, his certification, *made in honest reliance upon them*, would not be criminal; and if the cashier was reputed to be, and believed by the defendant to be, a man of honesty and right conduct as respects the affairs of the bank, the defendant would have the right to rely upon his statements in regard to that account.

The court, in speaking of Porterfield's testimony, said:

Whatever credit his testimony delivered here may be entitled to, the question remains with you to settle, upon all the evidence, whether the defendant Spurr, in certifying these checks, *acted in good faith and without any attempt to do that which the law forbids*, and which he must be presumed to know as unlawful, namely, the certifying of the check as good when the maker of it has no funds in the bank to meet it. *If he acted in good faith*, believing that the makers of the checks had funds in the bank to pay them, he should be acquitted.

As shown by the foregoing quotations, the court not only used the word "willfully," but used it twice, and used it "with reference to the false certification of checks;" and, as also shown by said quotations, the court

explained to the jury that the word "willfully" meant substantially the same thing as "designedly and in bad faith."

It will also be seen that the court again and again told the jury that the defendant could not be convicted unless he acted—

First. "With knowledge."

Second. "With a purpose to do wrong," *i. e.*, with "an intent to do that which the law forbids," or with "bad faith."

The court, therefore, gave the defendant the full benefit of both of the elements of "willfulness," as defined by the Supreme Court in the Potter Case.

TWELFTH ASSIGNMENT.

The Government, against the defendant's objection, introduced certain testimony tending to show that as early as 1886–87 the defendant knew that he and Porterfield were speculating in stocks in New York through Kohn, Popper & Co., De Neufville & Co., and Latham, Alexander & Co.; and that defendant also knew that Porterfield was using the bank's money in those speculations without the knowledge or consent of the directors or committees of said bank. The general purport of said testimony is set forth in the printed record.

The twelfth assignment is, that "it was error to admit the testimony relating to these transactions of 1886 and 1887 over the said objection of defendant, (and that) said objection should have been sustained, and such testimony rejected."

In the statement of the case made in this brief, the Government's evidence in regard to these transactions has been shown.

The Government anticipated that the defendant would testify that in certifying the checks for which he was indicted, he got his information in regard to the condition of the account of Dobbins & Dazey from Porterfield, the cashier.

The Government, therefore, as part of its case in chief, offered proof of certain purchases and sales of stocks on the New York Stock Exchange, in 1886–87, through Kohn, Popper & Co., DeNeufville & Co., and Latham, Alexander & Co., all of New York, in the name of F. Porterfield, cashier of the Commercial National Bank, for the account of sundry customers of said bank, including F. Porterfield, the cashier; R. S. Cowan, the assistant cashier, and the defendant, the president.

The Government also offered evidence tending to show by memoranda, charge and credit tickets, deposit slips, pencil statements and calculations, all in the handwriting of F. Porterfield, and by accounts and statements from the books of New York bankers and brokers, certain purchases and sales of stocks, made with the funds of said bank, remitted to New York by said Porterfield, for account of defendant and the other persons named.

The Government also offered evidence tending to show that some of those transactions resulted in profits, and some of them resulted in losses; that the profits and losses were divided equally between defendant and Porterfield; or divided between defendant, Porterfield, and Cowan; that said divisions of profits and losses between

said parties were made from memoranda, statements, calculations, etc., which were in the handwriting of Porterfield; that the profits made by defendant in said transactions were credited to him on the books of said bank at the time of said sale, and were afterwards credited on his pass book and drawn out by him.

The Government also offered evidence tending to show that the account which was originally opened with DeNeufville & Co. in the latter part of 1886 was afterwards transferred to Latham, Alexander & Co., and that it continued thereafter with them down to the failure of the bank.

As one evidence that defendant knew that the bank's money was being used by Porterfield in said transactions, the Government proved that in one of them there was a loss of $9,762.35; and that the defendant gave his note to said bank for $3,254.12, it being his one-third of said loss; that he afterwards twice renewed said note; and that he did not at any time inform the executive committee or directors of the bank that said notes, or any part of them, were given to cover losses on stock.

At the time of the trial the last one of said renewal notes was still unpaid.

As to the admissibility of said testimony, the court said:

> I greatly doubt whether it would be admissible, on the ground of remoteness of time, but I am inclined to think it admissible as affecting the question of the respondent's right to rely on the representations made by Mr. Porterfield, or upon his assumed correctness of action and honesty of purpose. * * *

> I think it bears in a sense upon the question of the right of Spurr to rely upon Porterfield's representation upon the question of fact, whether he did rely upon any assumed correctness or honesty of action.

The contention of the Government was that, under the decision of the Supreme Court in *Potter* v. *United States* (156 U. S., 446), it was necessary for the Government to show, first, "knowledge," and, second, "a bad intent;" that knowledge might be actual or constructive; that the collateral transactions above referred to proved that defendant knew that Porterfield had been missapplying the moneys and funds of the bank in their joint speculations; and therefore that defendant had no right to certify to the affirmative fact that a check of Dobbins & Dazey was good, in sole reliance (as he stated) upon Porterfield's representations.

In other words, the Government contended that said collateral transactions showed that defendant had such an intimate knowledge of Porterfield's conduct during that long period of time that for defendant to rely upon any statement made to him by Porterfield in reference to the account of Dobbins & Dazey (especially in view of the fact that defendant and Porterfield were at the time speculating in cotton futures through Dobbins & Dazey) placed defendant in the category of one who "had designedly abstained from inquiry for the purpose of avoiding notice."

The court, in its charge, said:

> The defendant is not indicted in this case, nor being tried for buying and selling stocks or bonds

or cotton futures, nor is it any crime against the laws of the United States for a bank officer to deal in such matters, on his individual account, without involving the bank. You should not allow the proof on this subject to influence your verdict in any way, unless you find from the proof, beyond a reasonable doubt, either that the defendant used the bank's funds dishonestly in such transactions, or that he knew that the cashier was using the funds of the bank for his own personal interest, or the interest of others. If you find, beyond a reasonable doubt, that the defendant did know of the unlawful use of the bank's funds by the cashier, as before indicated, that fact would not establish the defendant's guilt in this case, but would only be a circumstance to be considered by you in connection with the other evidence, on the question whether defendant knew (or was charged with knowing, because he purposely abstained from knowledge) at the time of certifying the checks mentioned in the indictment, that Dobbins & Dazey did not have funds and credits on deposit in the bank sufficient to meet those checks.

The court also instructed the jury as follows:

The defendant is not on trial directly for his complicity with such previous speculations and misuse of the bank's property in them, and proof of them has been admitted and is to be applied by the jury solely upon the question of knowledge and intent of the respondent when he made the false certifications of the checks mentioned in the indictment.

Again the court said:

If the jury find from the evidence that Mr. Porterfield was engaged, with the knowledge of Spurr,

> in thus misusing the credits and funds of the bank on cotton and stock exchanges in speculation in his own or other persons' interest, the jury are at liberty to find in that a reason why Mr. Spurr should not have confidence in Mr. Porterfield's integrity and fidelity to the interests of the bank, and why Mr. Spurr would in the exercise of his own duties have exercised a closer scrutiny of the dealings of Dobbins & Dazey with the bank, especially if he had reason to suppose that firm was engaged in such speculations.

These collateral transactions were clearly competent for the purpose to which the court, in its charge, restricted them.

It is contended by the defendant that this evidence was not irrelevant to the charges of the indictment.

It was not only relevant, but essential, that the Government should prove that the defendant had "*knowledge*" of the condition of Dobbins & Dazey's account; because knowledge is one of the main elements of "willful."

> See 155 U. S., p. 446, *Potter* v. *United States.*
> See 153 U. S., p. 594, *Evans* v. *United States.*
> See 96 U. S., p. 702, *Felton* v. *United States.*

When a person designedly abstains from inquiry for the purpose of avoiding notice, his status is precisely the same as though he had actual knowledge.

> See 142 U. S., p. 439, *Simmons Creek Coal Co.* v. *Doran.*

As the defendant knew, as far back as 1886-87, that Porterfield was misapplying the moneys and funds of the bank in their joint speculations, he had no right to certify to the affirmative fact that a check of Dobbins &

Dazey was good, in sole reliance (as he himself states) upon Porterfield's representations.

The defendant avoided the ledgers, the teller, and the bookkeeper from whom he knew he could get the truth; and (as he says) got his information from Porterfield, whom he knew had for years been misapplying the funds of the bank, and therefore was unreliable. In so doing the defendant "designedly abstained from inquiry," and did it "for the purpose of avoiding notice." His status, therefore, was precisely the same as if he had had actual knowledge; and the collateral evidence above referred to was admitted by the court as evidence of that knowledge.

See 142 U. S., 439, *Simmons Creek Coal Co.* v. *Doran.*

See 53 Fed. Rep., 658, *United States* v. *Graves.*

It is contended that this evidence was not admissible on account of remoteness in time.

The transactions referred to in the evidence were not admitted by the court as any part of the *res gestæ* of the transactions involved in the indictment. On the contrary, the court said:

> I greatly doubt whether it would be admissible, on the ground of remoteness of time; but I am inclined to think it admissible as affecting the question of the respondent's right to rely on the representations made by Mr. Porterfield, or upon his assumed correctness of action and honesty of purpose.

In other words, the evidence was admitted by the court upon the sole ground that it tended to show that the defendant knew that he had no right to rely upon Por-

terfield, and that he had been in possession of this knowledge as far back as 1886–87.

It is manifest that the longer the defendant had been possessed of knowledge of Porterfield's unreliability, the less excuse can he have for acting upon Porterfield's alleged statements.

It is also contended that there is want of connection between the transactions referred to in the testimony and those involved in the indictment.

The transactions referred to in the evidence were not admitted upon the theory that they were any part of the *res gestæ*, or that they were in any way connected with the transactions involved in the indictment. The only ground upon which they were admitted was that they tended to show defendant's knowledge.

The transactions involved in the evidence were not admitted by the court upon the theory that they were in anywise similar to the transactions involved in the indictment; but, as repeatedly stated above, they were admitted for the sole purpose of proving the fact of knowledge, as one of the elements of the word "willful."

The numerous authorities which defendant's counsel have collected with great diligence on the subject of "remoteness in time," not "contemporaneous," "want of connection;" "want of similarity;" etc., could doubtless have been multiplied many times over; but they have no bearing upon the question before this court, as the court below did not base its action on either of the grounds which those authorities are cited to condemn.

It is suggested that the transactions involved in the evidence were not shown to be fraudulent; or if so, that defendant had any knowledge of the fraud.

The evidence certainly tended to show that the defendant and Porterfield were jointly speculating in stocks; that Porterfield was keeping the account of the transactions and reporting how the profits and losses should be divided; that the defendant was accepting his share of the profits and losses from time to time as reported by Porterfield; and that defendant was using, as his own, the moneys thus realized as profits. The defendant certainly knew that Porterfield was using the moneys of the bank in those speculations, because he does not pretend that he furnished any moneys as a margin; he admits that he gave his note to the bank for $3,254.12 which was his share of the loss in one of the speculations in which he and Porterfield had been engaged; and he surely would not have given that note to the bank if he had not have known that it was the bank's money which had been lost in the transaction. The evidence also tended to show that neither at the execution of the original note nor at the execution of either of its renewals did he inform the executive committee that it represented money of the bank which had been lost by him and Porterfield in speculations; and it also tended to show that the moneys of the bank that were used by Porterfield in the joint speculations of himself and the defendant were so used without the knowledge or consent of the bank, its directors or committees.

If these transactions were not shown to be fraudulent, it would be very difficult to find a state of facts that would be fraudulent; and if the evidence admitted did not tend to show that the defendant had knowledge of the fraud, it would not be possible in any case to furnish evidence of fraud.

THIRTEENTH ASSIGNMENT.

The thirteenth assignment is that there is error in the following language of the charge of the court, on the subject of the transactions mentioned in the twelfth assignment of error:

> The using, by its officers, of the funds and credits of a national bank in speculation on stock and cotton exchanges carried on in the interest of the bank or its officers as individuals, or any other persons, is unlawful. Their franchises do not contemplate such operations and it is an abuse of the lawful powers of the bank, and such use is a misapplication of the property of the bank. The fact, if it be such, that other national banks, however numerous they were, were engaged in such business, did not render it legal, nor can the opinion of other persons that it was proper, rightfully affect the view which the court and jury must take of the legality of such practices. If the jury find from the evidence that Mr. Porterfield was engaged, with the knowledge of Spurr, in thus misusing the credits and funds of the bank on cotton and stock exchanges in speculations in his own, or other person's interest, the jury are at liberty to find in that a reason why Mr. Spurr should not have confidence in Mr. Porterfield's integrity and fidelity to the interests of the bank, and why Mr. Spurr would, in the exercise of his own duties, have exercised a closer scrutiny of the dealings of Dobbins & Dazey with the bank, especially if he had reason to suppose that firm was engaged in such speculations.

The first proposition contained in the language of the court quoted in this assignment is that—

> The using, by its officers, of the funds and credits of a national bank in speculation on stock and

cotton exchanges carried on in the interest of the bank or its officers, as individuals, or any other persons, is unlawful.

Dealing in stocks, though not expressly prohibited to national banks, is implied from the failure to grant the power. (See 92 U. S., 128, *First Nat. Bank* v. *Nat. Exchange Bk.*)

The second proposition is that the franchises of national banks "do not contemplate such operations, and it is an abuse of the lawful powers of the bank, and such use is a misapplication of the property of the bank."

This proposition is a corollary of the first proposition, and therefore must be equally sound. If it be unlawful for the officers of a national bank to use its funds and credits in speculations in stocks and cotton, carried on in the interest of the bank, or its officers or other persons, such use is necessarily an abuse of the lawful powers of the bank and a misapplication of the property of the bank.

The third proposition is that the fact that other national banks "were engaged in such business did not render it legal, nor can the opinion of other persons that it was proper rightfully affect the view which the court and jury must take of the legality of such practices."

It certainly can not be seriously contended that the practices of other national banks, or the opinion of other persons, can rightfully affect the view which a court and jury must take of the legal question as to whether the officers of a national bank have the right to use its funds in stock speculations.

The fourth proposition is that if Porterfield "was engaged with the knowledge of defendant in thus misusing

the credits and funds of the bank on cotton and stock exchanges, in speculations in his own or other persons' interests, the jury are at liberty to find in that a reason why Mr. Spurr should not have confidence in Mr. Porterfield's integrity and fidelity to the interests of the bank."

Porterfield, as the evidence tended to show in this case, was purchasing and selling the stock for outside customers of the bank. He stood between these customers and the bank, and is interested so to protect the bank as against these customers; but when he, with the knowledge of the president, took the moneys and funds of the bank without the knowledge or consent of the directors or committees of the bank and used them in speculating in stock for the individual benefit of the defendant and himself, dividing between them the money that represented profits, and giving their notes to the bank when losses occurred, not even informing the executive committee, who discounted the notes, that they represented moneys of the bank which had been lost in speculation, that conduct of itself certainly placed the defendant in a position where he would not have the right to rely upon Porterfield's integrity and fidelity to the interest of the bank.

FOURTEENTH ASSIGNMENT.

The fourteenth assignment is that there is error in the refusal of defendant's thirteenth request for special instructions on same subject, which was as follows:

> Although a national bank has no authority by law to receive and execute orders from its customers for the purchase and sale of stocks and bonds upon

> margin, yet if you find from the proof that it was customary for the national banks of this city to do such business, and that the Commercial National Bank did such business for its customers with the knowledge and approval of its board of directors, charging commissions and interest and requiring its customers to fully protect the bank by the deposit of ample funds or securities for that purpose, and that such business was a fruitful source of revenue or profit to the bank, and such profits were received and disbursed among the stockholders, and the defendant had no knowledge of or reason to suspect the unfaithfulness or dishonesty of the cashier in his conduct of such transactions, then the defendant can not and ought not to be prejudiced in this case by the fact that the bank did such business, nor by the fact that he himself gave to the cashier order for the purchase and sale of stocks on his own account, if he secured the bank amply with his own money or securities, as other customers were required to do.

The fact of the first part of this instruction is to tell the jury that even though it was unlawful for the national bank to use the funds of the bank in buying and selling stocks, yet if the other national banks of Nashville were in the habit of doing such business, and the Commercial National Bank also embarked in that business in order to make money for the bank, that then there would be no moral turpitude in so doing.

This instruction is exactly opposed to the instruction given by the court and discussed in the thirteenth assignment. If that instruction is right, this instruction is wrong.

The fact that other national banks in Nashville were unlawfully speculating in stocks was no reason why the

Commercial National Bank should embark in the same unlawful business, and if the defendant and Porterfield did embark in such business, the law presumes that they knew it to be unlawful.

The fact that the Commercial National Bank dealt in stocks and bonds upon margin with the knowledge and approval of its board of directors was wholly immaterial, because the board of directors has no right to approve such transactions. The fact that the bank charged commissions and interest, the fact that the business was a fruitful source of revenue or profit to the bank, and the fact that such profits were received and distributed among the stockholders are all immaterial. Such profits were illegal and ill-gotten gains, and the stockholders could no more legalize the transactions than could the directors. Neither the stockholders nor the directors, nor all of them combined, have the right to convert a national bank into a bucket shop, to dabble in stocks and bonds on margins. The history of the Commercial National Bank furnishes an all-sufficient reason why such practices on the part of national banks should be severely condemned by the courts.

The request which is made the basis of this assignment seeks to make unduly prominent the dealings which the Commercial National Bank had in stocks and bonds for some of its outside customers, and it seeks to unduly subordinate the dealings which were carried on by Porterfield for himself and the defendant.

An instruction which overlooks or ignores all the proof offered by the other side, and calls the attention of the jury only to the strong features in the party's own favor,

should be refused. (4 Fed. Rep., 357, *Behr* v. *Connecticut Mut. Life Ins. Co.*)

Said request asked the court to instruct the jury that if "the defendant had no knowledge of or reason to suspect the unfaithfulness or *dishonesty* of the cashier in his conduct of such transactions, then the defendant can not and ought not to be prejudiced in this case," etc.

The court did right in declining to use the word "dishonesty" in the peculiar connection in which the court was asked to use it. The term "dishonesty," while universally recognized as entirely appropriate, where some poor and obscure man steals a small amount of money, is not recognized by some of the modern sentimentalists as at all applicable to a cashier who misapplies hundreds of thousands of dollars of his bank's money, even though he may use them in speculating for himself and the president. The court, therefore, did not intend to leave it for the jury to decide whether the misapplication of the bank's money by Porterfield, in conducting the joint speculations of himself and the defendant, was or was not technical "dishonesty."

Said request also asked the court to instruct the jury that the defendant can not and ought not to be prejudiced in this case by the fact that he himself gave to the cashier orders for the purchase and sale of stocks on his own account, if he secured the bank amply with his own money or securities as "other customers" were required to do.

There is a very wide distinction between "other customers" and the defendant. In dealing with "other customers" the bank had the president and cashier to

rely upon to protect the bank's interest; but when the president and the cashier of the bank conspire together to use the bank's money in their joint speculations, without the knowledge of the directors and committees of the bank, the bank has no protection whatever.

FIFTEENTH ASSIGNMENT.

The fifteenth assignment is that there is error—

> In the modification of defendant's tenth request for special instructions, by striking therefrom the word "truth," and inserting instead thereof the words in brackets, namely, "right conduct as respects the affairs of the bank," which said instruction, so modified, and showing the word stricken out in italics and the substituted words in brackets, was as follows:
>
> "If you find from the proof that the defendant relied upon the statements and representations of the cashier as to the condition of the account of Dobbins & Dazey, and that he did so in good faith, believing those statements and representations to be true, and such statements were made at or so near the time of the certifications as to be fairly regarded as indicating the present state of the account, his certifications, made in honest reliance upon them, would not be criminal; and if the cashier was reputed to be and believed by the defendant to be a man of honesty and *truth* [right conduct as respects the affairs of the bank], the defendant would have the right to rely upon his statements in regard to that account."

The court, in substituting the words "right conduct as respects the affairs of the bank" for the word "truth,"

did exactly right. The cashier may have been reputed to be a man of "truth" in all of his outside dealings; and he may have established a reputation for "truth" in such dealings, not only with the community at large, but with the defendant also. He may also have been a man of "truth" with reference to the transactions of the affairs of the bank; and yet, however truthful he may have been, if the defendant knew that he was not a man of "right conduct as respects the affairs of the bank," the defendant had no right to rely upon his statements in regard to Dobbins & Dazey's account.

If the defendant knew that Porterfield had been using the funds of the bank to margin his own or defendant's speculative accounts, he knew that Porterfield had been guilty of a misapplication of the funds of the bank, and that such misapplication was a penitentiary offense.

The objection which defendant urges to the modification made by the court is that it makes the defendant's knowledge of what he calls the "technical" violation of the national banking law by Porterfield as cashier in the purchase and sale of stocks on margins, the test of the defendant's right to rely on Porterfield's statements in regard to the Dobbins & Dazey account.

It may suit the fastidious sensibilities of bank officers who wreck their institutions, to call the misapplication of the bank's funds a mere "technical" violation of the law; but Congress has constituted and declared it a penitentiary offense, and the courts must follow the definition by Congress rather than that by bank officials.

The evidence tended to show that when the national banks in Nashville first began to deal in stocks and

bonds "*it was not considered by the directors* (of the Commercial National Bank) *as exactly the right thing to do*, but that as all the other banks were doing it, and were receiving the profits, the Commercial National Bank commenced doing it for its customers."

In other words, the defendant knew that the cashier of that bank, *with knowledge that it was not "exactly the right thing to do,"* willfully misapplied the funds of the bank, during a long period of time, in the purchase of stocks and bonds for the joint account of himself and the defendant; and yet we are told that if the defendant believed Porterfield to be a man of mere "truth," defendant had the right to rely upon his statements with reference to the account of Dobbins & Dazey; notwithstanding the defendant also knew that the cashier, as well as himself, was speculating in cotton futures through Dobbins & Dazey, at the time the defendant was certifying the checks of that firm.

SIXTEENTH ASSIGNMENT.

The sixteenth assignment is that there is error—

> in the modification of defendant's eleventh request for special instructions on same subject, by striking therefrom the words, "was despoiling the bank and using its funds," and inserting instead thereof the words in brackets, namely: "had been using the funds and credits of the bank;" and by also striking therefrom the word "dishonesty," and inserting instead thereof the words in brackets, namely: "unlawfully in respect to its affairs"—said special instruction as so modified and showing the words

stricken out in italics and those substituted in parentheses, was as follows:

"The fact that the cashier had bought and sold stocks and bond or cotton futures, and that defendant knew the fact would not establish or imply that he was personally dishonest, nor deprive the defendant of the right to rely upon his statements in respect to the affairs of the bank, unless he also knew or had reason to believe that the cashier *was despoiling the bank and using its funds* (had been using the funds or credits of the bank), instead of his own in such transactions. In order to deprive the defendant of the right to rely upon the cashier it must be shown beyond a reasonable doubt that he knew that the cashier was unfaithful to the bank and acting *dishonestly* (unlawfully in respect to its affairs)."

The modification as made by the court, stated the law correctly.

If the defendant knew that the cashier "had been using the funds or credits of the bank, instead of his own," in speculating in stocks or bonds or cotton futures, the defendant was bound to know that Porterfield was guilty of a misapplication of the funds of the bank, and therefore, guilty of a penitentiary offense.

As to whether the use of such funds, under such circumstances, by the cashier, amounted to "despoiling the bank," there might be a difference of opinion among jurors, arising from the different meanings which different persons might attribute to the word "despoiling."

The court, therefore, wisely selected words which the jury could readily understand; and directed them that the defendant would not have the right to rely upon the cashier, if he knew that the cashier "had been using the

funds or credits of the bank instead of his own" in "speculating in stocks, bonds or cotton futures."

The court was also correct, in that particular connection, in substituting for the word "dishonestly" the words "unlawfully in respect to its affairs." Jurors might differ as to whether the unlawful use by the cashier of the funds or credits of the bank instead of his own, in speculative transactions, was acting "dishonestly;" but they could not differ as to the meaning of the words employed by the court in place of the word "dishonestly."

The word "dishonestly" jars upon the sensitive nerves of bank wreckers; and, in their polite parlance, acts which plain people consider as dishonest are classed as mere "irregularities." But the act which Congress has branded as a penitentiary offense is the willful misapplication of the bank's moneys, funds or credits; and that is the act of which Porterfield was guilty, if, without the knowledge or consent of the directors and committees of the bank, he "used the funds and credits of the bank instead of his own in speculating in stocks, bonds, or cotton futures."

SEVENTEENTH ASSIGNMENT.

The Government introduced testimony against the defendant's objection with respect to an account of Hersfeld & Co., with "Frank Porterfield, separate," and in respect to another account of Latham, Alexander & Co., with "Porterfield and Spurr," heretofore commented upon in the statement of the case in this brief.

The seventeenth assignment is that "It was error to admit the testimony relating to those two accounts over

said objection of defendant. (And that) said objection should have been sustained and such testimony rejected."

This testimony tended to show, in brief, that the account of Herzfeld & Co. with "Frank Porterfield, separate," was opened in March, 1889; that the account of Latham, Alexander & Co. with "Porterfield and Spurr" was opened in October, 1889; that both of said accounts continued down to the failure of the Commercial National Bank, in March, 1893; that both of them were joint accounts in which the defendant and Porterfield were equally interested; that large amounts of the moneys of said bank were sent by Porterfield, as cashier, to Herzfeld & Co. and to Latham, Alexander & Co. from time to time, down to the failure of said bank; that said moneys were sent to margin said accounts; that said moneys were sent with the knowledge of the defendant; and that they were sent without the knowledge of the directors or committees of said bank.

These accounts of Herzfeld & Co. and Latham, Alexander & Co., covering a period from 1889 down to the failure of the Commercial National Bank, in 1893, were in all respects similar to the accounts of Kohn, Popper & Co., and De Neufville & Co., which were current in 1886–87, and which have been commented on in this brief in the twelfth assignment of error.

In the comments on the twelfth assignment of error it was shown that the testimony relating to the accounts of Kohn, Popper & Co. and De Neufville & Co., current in 1886–87, was properly admitted, on the ground that it tended to show that as far back as 1886–87 defendant knew that Porterfield was, without the knowledge or

consent of the directors or committees of the bank, and with the knowledge and consent of the defendant, using the bank's moneys, in the joint speculations of himself and the defendant; and, therefore, that defendant had no right to rely upon Porterfield's (alleged) representations in regard to the condition of Dobbins & Dazey's account.

The testimony relating to the accounts of Herzfeld & Co. and Latham, Alexander & Co. was properly admitted on the same ground as the testimony relating to the accounts of Kohn, Popper & Co. and De Neufville & Co.

As the accounts of Herzfeld & Co. and Latham, Alexander & Co. continued down to the failure of the bank, they were admissible to show that the knowledge of Porterfield's unreliability, which defendant acquired as early as 1886–87, was repeatedly refreshed and strengthened from time to time down to the failure of the bank.

EIGHTEENTH ASSIGNMENT.

The eighteenth assignment is that there is error—

in the refusal of defendant's fourteenth request for special instructions in reference to personal dealings in stocks by Porterfield and Spurr, which was as follows:

"The fact that the defendant, jointly with Frank Porterfield, bought railroad stocks through Latham, Alexander & Co. in their joint personal names and with their own means, is not evidence of the dishonesty of either, nor is the fact that they bought, in the same way, similar stocks in the name of Porterfield individually, through Herzfeld & Co.; and if you

believe that these accounts were mere personal transactions, not involving the bank in any way, so far as the defendant was concerned, and he did not know of, or consent to, the use of the bank's funds by Porterfield in those transactions, he can not be affected and ought not to be prejudiced by any such misuse of the bank's funds by Porterfield."

The court refused the instruction requested, "because the subject was covered by other instructions."

The "other instructions" referred to were as follows:

The court gave the twelfth special instruction asked by the defendant, after modifying it in a manner not excepted to, as follows:

12. The defendant is not indicted in this case nor being tried for buying and selling stocks or bonds or cotton futures, nor is it any crime against the laws of the United States for a bank officer to deal in such matters. (I interpolate: On his individual account, without involving the bank.) You should not allow the proof on this subject to influence your verdict in any way, unless you find from the proof, beyond a reasonable doubt, either that the defendant used the bank's funds dishonestly in such transactions or that he knew that the cashier was using the funds of the bank for his own personal interest or the interest of others. If you find, beyond a reasonable doubt, that the defendant did know of the unlawful use of the bank's funds by the cashier, as before indicated, that fact would not establish the defendant's guilt in this case, but would only be a circumstance to be considered by you in connection with the other evidence on the question whether defendant knew (or was charged with knowing, because he purposely abstained from knowledge) at the time of certifying the checks mentioned in the

indictment that Dobbins & Dazey did not have funds and credits on deposit in the bank sufficient to meet those checks.

The court also instructed the jury, in the general charge, among other things, as follows:

> The defendant is not on trial directly for his complicity with such previous speculations and misuse of the bank's property in them, and proof of them has been admitted and is to be applied by the jury solely upon the question of knowledge and intent of the respondent when he made the false certifications of the checks mentioned in the indictment.
>
> The court also instructed the jury that "the fact that the cashier had bought and sold stocks and bonds or cotton futures, and that the defendant knew the fact, would not establish or imply that he was personally dishonest nor deprive the defendant of the right to rely upon his statements in respect to the affairs of the bank, unless he also knew or had reason to believe that the cashier had been using the funds or credits of the bank instead of his own in such transactions. In order to deprive the defendant of the right to rely upon the cashier, it must be shown beyond a reasonable doubt that he knew that the cashier was unfaithful to the bank and was acting unlawfully in respect to its affairs."

The request which is made the subject of error under this assignment was fully and fairly covered by the other instructions given by the court.

NINETEENTH ASSIGNMENT.

The nineteenth assignment is that there is error in the exclusion of the evidence of John Overton

and other witnesses, offered by defendant, first, as to defendant's good character for truth and veracity; and secondly, as to defendant's good character for honesty and integrity during the whole period of his residence in Nashville.

The Government introduced all of its evidence before it rested. No witness was offered by the Government in rebuttal after defendant's witnesses were examined. The Government did not offer any evidence as to the general character or reputation of the defendant; nor did it offer any evidence as to his general reputation for veracity or honesty.

The defendant voluntarily testified as a witness in his own behalf, his direct and cross-examination both being at great length and occupying parts of three days.

After the defendant had been cross-examined by the Government in the manner set forth in the printed record, the defendant called and proposed to examine witnesses as to his good character, and his counsel asked a witness, Mr. John Overton, certain preliminary questions touching his age and residence, and the witness having stated his acquaintance with defendant for about thirty years, the following colloquy occurred:

Q. Do you know his general character and reputation in this community during that period for honesty and integrity and truth and veracity?

A. I do, sir.

Mr. BAXTER (for the Government): The Government insists that the question ought to be divided. As to his reputation for honesty and integrity, it ought to be confined to the filing of the indictments, at least to the time of the charge in this case.

Mr. PITTS (for defendant): If your honor please, we insist upon our right to put Major Spurr's character in issue, both for honesty and integrity and truth and veracity, during the entire period that he had lived in Nashville up to the time of this investigation and subsequent thereto.

The court in its ruling said:

I am quite clearly of the opinion that you are entitled to ask this witness questions showing the length of time of his acquaintance, his familiarity with the defendant, and his means of knowledge of the general character which the defendant has sustained in the community up to the time of the transactions; and then ask him what that character was, if the preceding questions have shown he is sufficiently competent to testify on that subject. With respect to the other question in the case—that is, the respondent's character for truth and veracity—I am not satisfied that you have a right to go into that question generally, unless his *character* has been attacked by the evidence on that subject.

Thereupon the examination of the witness Overton was resumed as follows:

Q. (by defendant). Now, Colonel Overton, I understand you to say you had known his general character?

A. Yes, sir.

Q. What was that general character down to the time (as the court has limited me) to this charge against him?

A. I think it was good, sir.

Q. Now, do you know what his general character in this community, up to this time, has been for truth and veracity.

(Objected to by the Government.)

The question as to the admissibility of this evidence (as to truth and veracity) was argued by counsel and taken under advisement by the court.

Other witnesses were then examined under the preliminary ruling and limitation, counsel for the defendant stating to the court that he wished to ask all of them "as to the character of defendant for truth and veracity during their entire acquaintance with him down to the present time; also, that he wished to asked them as to his character for honesty and integrity during the same period."

On the morning succeeding the argument of the question of the admissibility of evidence as to defendant's truth and veracity, the court announced its adherence to the preliminary ruling above stated, under which the court had excluded evidence as to the defendant's character for truth and veracity, and to this ruling of the court defendant excepted. The court "based its ruling upon the fact that there had been no attack of defendant as a witness by evidence of bad *character*," and that there having been no proof offered by the plaintiff, of defendant's bad *character* as a witness, no proof of his good *character* for truth and veracity could be offered by the defendant."

As a result of the ruling of the court the defendant was allowed to introduce witnesses as to his "general character down to the time of the charge against him," but he was not allowed to bring that evidence down to the date of the trial. He was not allowed to introduce any evidence as to his "character for truth and veracity."

"Evidence of good character (for peace and quiet) must be confined to the time of and anterior to the commission of the offense for which defendant is being tried."

111 Ala., 96, *White* v. *State.*
73 Ia., 536, *State* v. *Ward.*
43 Ia., 296, *State* v. *Kinley.*
51 Pac. Rep., 1090, *State* v. *Marks.*
29 Tex. App., 32, *Graham* v. *State.*

First. There can be no doubt as to the correctness of the court's ruling to the effect that while the defendant was entitled to introduce witnesses to show his *general character*, down to *the time of the charge against him*, he had no right to bring that evidence *down to the date of the trial*. The rule upon the subject is correctly stated by his honor as follows:

> The rule which allows the defendant to offer proof of his character is based upon the presumption that a man who has a good character would not commit the offense with which he is charged, and, of course, as the inquiry is in reference to a question of fact, whether he did do that thing or not. I think the time to which the testimony should relate in regard to his good character should also have reference to that time. Now, there is a very important reason, counsel must see, if they reflect upon it, for limiting the inquiry to that time. If we were to bring the time down to the present, it would be liable to embarrass the jury and to turn their minds from the real merits of the case and put before them opinions which ought to be kept as far from the jury as possible. If we come down to the present, we would proceed to launch ourselves upon an inquiry as to what the people of the community thought of the case at present, and as to whether the defendant's reputation stood untarnished since this transaction or since his arrest.

Second. As to the ruling of the court excluding evidence of the defendant's "character for truth and veracity," it will be remembered that the Government introduced all of its testimony before the defendant was examined, and, in fact, before he offered any testimony in his behalf.

It will also be remembered that after the defendant gave his testimony, and introduced all of the other testimony that was used in his behalf, the Government offered no testimony whatever in rebuttal.

After the Government had introduced all of its testimony the defendant voluntarily went upon the stand and undertook, by his own testimony, to contradict the testimony which the Government had previously offered in the case; and because he had seen proper to voluntarily contradict the Government's testimony, he sought to bolster up his own testimony by offering certain witnesses to prove his general character for truth and veracity down to the time of the trial.

We submit that the court committed no error in excluding such testimony.

An accused man can not bolster up his own testimony by proof that he is a man of good character for truth and veracity, where no attempt has been made to impeach him, by evidence of bad character, or of statements made by him out of court contradictory of his testimony, although such testimony conflicts with that of other witnesses.

100 Ala., 36, 37; 14 Rep., 877, *Funderberg* v. *State*.

112 Ill., 266, 267, *Tendens* v. *Schumers*.

64 Vt., 609, *Stevenson* v. *Genning*.

25 Tex. App., 613, *Rushing* v. *State*.

93 Cal., 597, *People* v. *Cowgill*.

See also 1 Whart. Ev., § 569; 8 Pick. (Mass.), 153–154, *Russell* v. *Coffin;* 3 Hill (N. Y.), 313, *The People* v. *Hulse;* 5 Denio (N. Y.), 108–109, *Starks* v. *People;* 3 Selden (N. Y.), 379–380, *The People* v. *Gay;* 10 Conn., 13, *Rodgers* v. *Moore;* 4 Duer.

(N. Y.), 420, *Seonosi* v. *Bishop;* 30 Md., 456, *Vernon* v. *Tucker;* 78 Mo., 327, *State* v. *Thomas;* 31 Ill. App., 36, *C. A. R. R.* v. *Fisher;* 73 Iowa, 320, *State* v. *Archer;* 4 Gray (Mass.), 574, *Haywood* v. *Reed;* 15 Sou. W. Rep. (Mo.), 290, *State* v. *Patrick;* 9 Harris (Pa. St.), 274, *Werts* v. *May;* 86 Ind., 516, *Brown* v. *Campbell;* 71 Mo., 436, *State* v. *Cooper;* 65 Cal., 129, *People* v. *Bush;* 99 Ind., 28, *Fitzgerald* v. *Goff;* 38 Hun. (N. Y.), 168; 33 N. Y. S. R., 486, *Young* v. *Johnson;* 123 N. Y., 226, *Young* v. *Johnson;* 6 Gray (Mass.), 451, *Brown* v. *Moores;* 19 Tex. App., 319, *Ricks* v. *State;* 29 Barb. (N. Y.), 620; 2 Met. (Ky.), 583, *Vance* v. *Vance;* 25 S. W. Rep., 342, *Landa* v. *Obeset.*

The case of *Richmond* v. *Richmond* (10 Yerger, 345) is cited by counsel for defendant. That case was decided in 1837.

It appears from the report of the case, that Hamilton, (a witness) was subjected to a "*searching*" cross-examination by defendant's counsel, in which were many questions as to the situation of the buildings; his "*motives*" for being in the place where he witnessed the facts to which he deposed, etc.

The report does not set forth in full the "*searching* cross-examination;" nor does it set forth any of the "many questions" which were put to him; nor does it inform us as to the character of the "*motives*" which the cross-examination attributed to him.

It may be that the very nature of the cross-examination in *that* case impeached the general character of the witness for truth and veracity. But the cross-examination in this case did no such thing.

In the absence of information on the points above referred to, the report of the case fails to show satisfactorily that the precise question involved in the case at bar was decided in that case.

The court in that case announced as a proposition of law that:

> A witness may be impeached—
>
> 1. By proving that he is not worthy of credit.
>
> 2. Or that the facts to which he deposes are not true.
>
> 3. Or by cross-examination, in which he may be involved in inconsistencies.

See 10 Yerger, page 345.

As to the second case put by the court; viz, that a witness may be "*impeached*" by proving that the facts to which he deposes are not true; it seems to us to ignore the correct meaning of the word "impeach."

To "impeach" means to challenge or discredit the "*credibility*" of a witness. (See Webster's Unabridged; Rapalje's Law Dictionary.)

Though a witness may be contradicted in the most direct and positive manner; and though it may be the intention of counsel to insist that his testimony is untrue, it does not "impeach" his *character* for "*credibility.*" For a witness of the highest character for "credibility" may testify to a fact of the utmost importance, and yet the fact testified to by him may be absolutely false.

If the supreme court of Tennessee intended to hold that wherever a witness is contradicted evidence of his good character for veracity may be introduced to sustain it, then where twenty witnesses on one side contradict twenty witnesses on the other side (as is frequently the

case in admiralty suits, and suits involving the identity of persons or animals), witnesses to sustain the reputation for veracity of each of the witnesses contradicted may be introduced, and the jury may be diverted from the consideration of the real question submitted to them into a collateral inquiry as to the reputation of the witnesses in the case.

The case of *Richmond* v. *Richmond*, though decided in 1837, has never been reaffirmed or ever referred to, by the Supreme Court on the point now in controversy.

But if that case had decided the point as contended for by counsel for defendant, and if it had been reaffirmed by the supreme court of the State, it would not be controlling in this court.

The Tennessee statute permitting a defendant to testify was approved March 14, 1887. (See Acts of Tennessee, 1887, p. 158.)

The only reported cases decided on the statute are:

2 Pickle, 259, *Peck* v. *State*.
5 Pickle, 232, *Staples* v. *State*.
7 Pickle, 725, *Richards* v. *State*.
7 Pickle, 619, *King* v. *State*.
7 Pickle, 522, *Hill* v. *State*.
8 Pickle, 283, *Clemons* v. *State*.
10 Pickle, 201, *Clapp* v. *State*.
10 Pickle, 496, *Lea* v. *State*.

The only one of those cases that can be claimed to have any bearing on the question now under consideration, is the case last cited, viz, *Lea* v. *State*.

In the case of *Lea* v. *State* (10 Pickle, 496) the defendant, after testifying in his own behalf, introduced three witnesses as to his general character.

only quoted part of this instruction. The entire instruction is as follows:

> Evidence has been offered to prove Dobbins & Dazey to have been heavily overdrawn for some time when some of these checks were verified by the defendant and that this fact was and for some time had been a matter of common knowledge among the employees of the bank; and further, that it was not customary for checks to to be sent to the president for certification when there were funds in the bank belonging to the drawer sufficient to cover the check, and there is other evidence, which, if believed, tends to show express knowledge on the part of the defendant of the state of the account; nevertheless, he testifies that he did not know that Dobbins & Dazey's account was overdrawn when he certified these checks, or any of them, or that there was a lack of funds in the bank to pay them, and that he had no reason for supposing their account to be overdrawn or that there was too small a sum to their credit to meet them.
>
> Gentlemen, do you think this is true? It is for you to say, and as you are responsible for your answer, I shall do no more than challenge your serious attention to the evidence in the case touching this question; not only that I have referred to, but all else that reflects light upon it. If you believe this statement of the defendant to be true, there is an end of the case and the defendant should be acquitted; and the same result should follow if you are not satisfied beyond a reasonable doubt that the contrary is a fact.
>
> In determining these questions you are to look to all the evidence bearing upon his knowledge and give all its just effect. You are not restricted to the direct evidence of the facts. The moral probabil-

A witness impeached by disproving the truth of his evidence, but not otherwise, can not be sustained by evidence of his good character.

93 Ga., 481, *Miller* v. *W. and N. R. R.*
5 Ind. App., 252, 253, *Diffenderfer* v. *State.*
21 Ind., 16, *Pruitt* v. *Cox.*
77 Ind., 280, *Presser* v. *State.*
13 Wash., 524, *State* v. *Nelson.*
9 Watts (Penn.), 124, *Braddie* v. *Brownfield.*

> ities flowing from conceded facts or which are proven to your satisfaction should also be considered, and such probabilities may furnish ground for believing that that which they indicate is the truth.

Counsel do not complain that this instruction is error, but they only complain of it in connection with the contention that the court should have permitted the defendant to introduce evidence as to his general reputation or character for truth or veracity, placing their contention upon the ground that this particular instruction was an attack by the court upon the defendant's testimony.

The court will notice that this instruction, while it comments upon the testimony of the defendant, is not confined to that alone, but calls attention to all the facts and circumstances proven in the case, and specifically instructs the jury that all these facts and circumstances are to be considered in connection with the testimony of the defendant in determining the issues in this case.

The contention of counsel is that this instruction was an assault upon the testimony of the defendant. There is no question but what the court has the right to comment upon in any part of the testimony given in the case provided the jury are fully instructed that, notwithstanding such comments, they are to find the ultimate fact. This was done in this case.

The ruling of the trial court was that evidence of general reputation or character for truth and veracity could not be introduced in this case because the *reputation* and *character* of the defendant for truth and veracity had not been attacked. There is a vast difference between an attack upon particular testimony given in a case and an

attack upon the character and reputation of the witness who testifies.

If it were proper to introduce evidence of a general good reputation for truth and veracity in every case where the testimony given by a witness is commented upon and attacked by counsel in argument, it would mean a general rule that evidence of a general good reputation for truth and veracity of every witness who testifies could be introduced in *every* case. There are few cases tried in the *nisi prius* courts of the United States or States where the testimony of witnesses is not commented upon, and in a measure, attacked by counsel in the presentation of the case.

TWENTIETH ASSIGNMENT.

The twentieth assignment is, that there is error "in the action of the court in overruling defendant's motion for arrest of judgment for uncertainty and insufficiency of the verdict of the jury." (See printed transcript.)

The minute entry, which shows the form of the verdict, was as follows:

> Came the United States attorney, and also the defendant in proper person, and came also the jury heretofore impaneled, and upon their oaths do say that they find the defendant guilty as charged in the indictment upon the last three certified checks in the indictment and recommend him to the mercy of the court. (See printed record.)

The sentence of the court that was pronounced upon the verdict was as follows:

> And thereupon the United States, by its district attorney, moved the court for sentence upon the

verdict of the jury heretofore rendered, upon count No. 2 of indictment No. 7994; count No. 2 of indictment No. 8139; counts Nos. 1 and 4 of indictment No. 7994; count No. 3 of indictment No. 8139; count No. 2 of indictment No. 8078; and count No. 5 of indictment No. 8139. The defendant was thereupon called upon by the court to stand, and was asked by the court if he had anything further to say why the sentence of the law should not be pronounced against him, and he replied that he had nothing further to say than he had already said; and the court, being cognizant of the facts attending said verdict, and of the manner in which the issues found by said verdict were submitted to the jury, finds and so orders and adjudges, that said verdict is applicable to indictment No. 7994, counts 1 and 4, and indictment No. 8139, count 3, all of which are based upon a check certified by the defendant, dated January 3, 1893, and upon said verdict upon said counts of said indictments, the court orders and adjudges that the defendant be confined in the penitentiary of the State of New York at Albany, New York, for two years and six months from this date.

Defendant's counsel in their brief submit this question without argument. We quote some authorities relative to the degree of certainty that is required in verdict and to the power of courts to mould verdicts.

DEGREE OF CERTAINTY REQUIRED IN VERDICT.

Certainty to a common intent is sufficient. (2 Wheaton (309), *Liter* v. *Green*.)

It is the lowest degree known to the rules of pleading. (Gould Plead., p. 73.)

Any words which convey the idea to the common understanding are adequate. (157 U. S., 279, *Statler* v. *United States.*)

Being "*the finding of lay people,*" it need not be framed under the strict rules of pleading, or after any technical form. (157 U. S., 279, *Statler* v. *United States.*)

All fair intendments will be made to support it. (157 U. S., 279, *Statler* v. *United States;* 154 U. S., 154, *St. Clair* v. *United States.*)

Though expressed in bad English, it is sufficient, if it clearly manifest the intention of the jury. (112 U. S., 217, *Snyder* v. *United States.*)

POWER OF COURT TO MOULD A VERDICT.

If a verdict find the *substance*, the court will mould it into *form.* (Brightly Fed. Dig., p. 675, § 462.)

The substance of this verdict is the finding of "*guilty.*" (37 Ill., 462, *Armstrong* v. *People.*)

HOW A VERDICT MAY BE AIDED.

All parts of the record must be interpreted together, supplying a deficiency in one part, by what appears elsewhere in the record. (154 U. S., 154, *St. Clair* v. *United States;* 151 U. S., 419, *Pointer* v. *United States.*)

The indictment may be referred to. In one case the verdict was "guilty of shooting, not in his own defense." As the indictment was for manslaughter, judgment was entered *as if the jury had added "without justification."* (51 Ga., 146, *Arnold* v. *State.*) In another case Green Martin was indicted with a third person, but Martin

alone was tried. The verdict was: "We find the defendant guilty." Judgment was rendered as if Martin's name had been mentioned in the verdict. (25 Ga., 502, 503, 512, *Martin* v. *State.*)

The evidence may be referred to.

The *evidence and the pleadings* may be used. (12 How., p. 45, *Parks* v. *Turner*, cited in 112 U. S., p. 217, *Snyder* v. *United States* (which is a criminal case).)

In a certain case, two felonies, requiring different punishments, were charged in different counts, and a general verdict was rendered. Held: that the court could see, *from the facts*, upon which count to render judgment. (34 Conn., p. 299, *State* v. *Tuller.*)

The charge or instructions may be referred to.

In a certain case the jury found for defendant, but failed to find a fact which the court instructed them to find if they found for defendant. (96 U. S., p. 626, *Gregory* v. *Morris.*)

THE VERDICT IN THIS CASE.

"We, *the jury, find the defendant guilty* (on the three last certified checks, and recommend him to the mercy of the court)."

The words *italicized* constitute a general verdict of guilty on all the counts. (160 U. S., 197, *Ballew* v. *United States;* 157 U. S., 279, *Statler* v. *United States.*)

The words in parentheses are "superfluous," and striking them from the verdict, leaves it in all respects complete and responsive to the charge. (157 U. S., 279, *Statler* v. *United States.*)

The words "as charged in the indictment" would have been supplied by construction. (157 U. S., 279, *Statler* v. *United States;* 154 U. S., 154, *St. Clair* v. *United States.*

The words in parentheses, while *superfluous in law*, are suggestive or advisory, to the court, as to the punishment.

ANOTHER VIEW OF THE VERDICT.

"Guilty on the three last certified checks," means guilty on the counts which are based on the three checks that were "last certified," and upon which evidence was offered.

The three checks that were "last certified," and upon which evidence was offered, were—

Check dated December 17, 1892, for.....	$31,000.00
Check dated January 3, 1893, for.....	40,000.00
Check dated February 13, 1893, for.....	9,641.95

The following counts were based on those checks, respectively:

Indictment 7994, count 2..	Based on check of Dec. 17.
Indictment 8139, count 2..	
Indictment 7994, counts 1 and 4.....	Based on check of Jan. 3.
Indictment 8139, count 3..	
Indictment 8078, count 2..	Based on check of Feb. 13.
Indictment 8139, count 5..	

See the indictments in the unprinted part of the record.

As the jury did not have the indictments, it was impossible for them to specify the counts which were based on those three checks.

The court, in the charge to the jury, said:

"The specific charges upon which the defendant is now being tried *are the certification of the following checks,*" *etc.* They were then described in the *order of their dates.*

The court also sent the checks to the jury.

With the checks before them, and under the charge, the jury said "guilty on the three last certified checks."

The jury did not mean to say "guilty *on the checks,*" for that is absurd.

Their language is to be aided by all fair intendment. It is sufficient, if it convey the idea to the common understanding. Though expressed in bad English, it is sufficient if it manifests their intention. It was not necessary for it to be framed in technical form, nor under the strict rules of pleading. The very lowest degree of certainty will do.

The jury did not mean guilty on the three checks *that were last described in the indictment;* because they did not have the indictments, and could not know which there *were "last described."*

CHECK OF JANUARY 3, 1893.

It was one of the three checks that were "last certified."

It was described in the last count of indictment No. 7994, and in one of the three last counts of indictment No. 8139.

It answers equally well:

One of the "last three certified checks."

And one of the "last three certified checks (described) in the indictment."

Taking the instructions of the trial judge as given to the jury, they in substance told the jury that if they believed from the evidence that the defendant certified the checks described in the indictment, and that at the time he so certified them Dobbins & Dazey had no money on deposit in the Commercial National Bank with which to pay said checks, and that the defendant knew when he certified the checks of the condition of the account of Dobbins & Dazey, and that the defendant *willfully, designedly, and in bad faith* certified the checks, that in such case, the defendant was guilty.

These instructions were correct.

There was ample evidence for the jury to find that the defendant certified the checks; that when he certified them Dobbins & Dazey, who drew the checks, had no money on deposit in the Commercial National Bank to pay them; that the defendant, when he certified the checks, knew of the condition of Dobbins & Dazey's account, and knew it was overdrawn; that in the affirmative act of certifying the checks he acted willfully, designedly, and in bad faith.

The defendant has had a fair trial. The instructions of the court, taken as a whole, fairly instructed the jury as to the law governing the case. The defendant is guilty. The judgment of the trial court and of the circuit court of appeals should be affirmed.

Respectfully submitted.

JOHN G. THOMPSON,
Assistant Attorney-General.

ED. BAXTER,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

MARCUS A. SPURR, PETITIONER,
v.
THE UNITED STATES. } No. 448.

SUPPLEMENTAL BRIEF AND ARGUMENT FOR THE UNITED STATES.

I.

Petitioners's counsel, on page 55, of their brief, quote the following sentence from the charge:

> It was the defendant's duty, before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn.

We do not understand counsel to controvert the proposition contained in that sentence.

On the contrary, they concede it.

On page 70 of their brief, they say:

> Now, we do not insist that it was not the duty of defendant to inform himself of the condition of the accounts; we concede that it was his duty to do so, etc.

And on page 77 of their brief they say:

> We have granted that it was the defendant's duty, growing out of his relationship to the bank as president, to inform himself whether sufficient funds were in the bank before certifying the checks, etc.

If this court should hold that it was not the duty of a bank officer to inform himself of the condition of an account before certifying a check, any such bank officer could shield himself from all criminal responsibility by merely abstaining from inquiry in regard to a fact the truth of which he assumed to certify.

II.

Petitioner's counsel, on page 55 of their brief, quote the following sentence from the charge:

> From the existence of such a duty you *may draw an inference of fact* that he did so inform himself, if he did not already know it;"

The court did not tell the jury that it was a presumption *of law*. The court merely told them that they "may draw an inference *of fact*." The court did not tell the jury that they *were bound* to draw even an inference *of fact*. All that the court said was that they "*may*" do so.

A "presumption of law means" that where certain facts are proven, the *law* presumes the existence of a certain other fact.

A presumption of law may be conclusive; and in such a case no testimony will be admitted to contradict it.

The presumption of law that an infant under 7 years of age is incapable of committing a felony is conclusive; and no testimony will be admitted to contradict it.

(Clark's Criminal Law, p. 49, § 26; 4 Blackstone Com., p. (22).)

Or, a presumption of law may be disputable; and in that case the presumption may be contradicted by testimony.

The presumption of law that an infant over 14 years of age is capable of committing a felony is disputable; and it may be contradicted by testimony showing that the particular infant in question was, in fact, incapable of committing the crime charged against him.

But the burden is upon the defendant in such a case, to show affirmatively that he was incapable of committing the felony charged against him. (Clark's Criminal Law, p. 49, § 26.)

Whether a presumption of *law* be conclusive, or disputable, it is created by the *law*, and the jury are *bound* to act upon it, whether they believe it to be reasonable or unreasonable.

On the other hand, an "inference of *fact*" is at best a mere argument. (Lawson on Presumptive Ev., p. 356.)

The law takes no cognizance whatever of a mere inference of fact; and the jury are left perfectly free to adopt or reject it, as it may appear to their minds to be reasonable, or not.

And so the court in this case told the jury, not that they must, but that they "may" draw a certain "inference of fact."

III.

Petitioner's counsel, on page 77 of their brief, cite the case of *United States* v. *Ross* (92 U. S., 281), for the

proposition that "even the presumption that public officers have done their duty does not supply proof of independent and substantive facts."

In that case this court, in reversing the action of the Court of Claims, said:

> Certain facts have been found, and from them it was inferred as matter *of law* that other facts existed; and upon the facts thus inferred the court gave judgment. We think in this there was error. (92 U. S., 282.)

Again: After stating the facts that were found in that case by the Court of Claims, this court said:

> Such were the facts found, and from them the court deduced *not* as a conclusion of *fact*, but as a presumption of *law*, that the 31 bales removed on Government wagons to the warehouse immediately adjoining the railroad at Rome shortly after May 18, 1864, were a part of the 42 bales received at Nashville on the 24th of August, four months afterwards, and there turned over to the Treasury agent. (92 U. S., p. 283.)

In that case the Court of Claims gave to a certain deduction all the potency of a presumption of *law;* while in this case the court merely told the jury that they might, if they saw proper, draw a certain inference of *fact*.

The correct rule upon the subject is thus stated by this court:

> Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. (92 U. S., p. 284.)

But where the circumstances are themselves proved, the jury may or may not deduce from them, as an inference of fact, the existence of the ultimate fact to be proved; for if it were not so, circumstantial evidence could not be used at all.

The only reason why circumstantial evidence is ever resorted to, is because direct evidence of the ultimate fact to be proved in the particular case can not be obtained.

In the Ross Case, the ultimate fact to be proved was that the proceeds of complainant's cotton were paid into the Treasury of the United States; and complainant was forced to rely upon circumstantial evidence to prove it.

(1) He proved that in May, 1864, he owned 31 bales of cotton, then in a warehouse in Rome, Ga.

(2) He proved that on the 18th of that month Rome was captured by the United States forces.

(3) He proved that shortly afterwards said cotton was removed on Government wagons to another warehouse adjoining the railroad leading from Rome to Kingston, and connecting there with a road leading thence to Chattanooga.

But whether complainant's cotton was the only cotton in that warehouse was not found, and it was inferable from the other facts that it was not.

(4) He proved that subsequently (but how long afterwards did not appear) all of the cotton *then* in that warehouse was shipped on the railroad to Kingston, the road being then in the possession of the military authorities. But it was not shown that complainant's cotton was still in that warehouse when said shipment was made.

(5) He proved that some cotton arrived in Kingston from Rome before August 19, 1864, and was forwarded to Chattanooga. But it was not shown that complainant's cotton was a part either of the cotton that was forwarded from Rome to Kingston, or of the cotton that was forwarded from Kingston to Chattanooga.

(6) He proved that on August 19, 42 bales of cotton were received at Chattanooga from the quartermaster at Kingston. But it was not shown that complainant's cotton was part of the cotton that was received at Chattanooga.

(7) He proved that the 42 bales received at Chattanooga were shipped to Nashville, where they were received as coming from Kingston; that they were turned over to the Treasury agent, and that they were sold. But it was not shown that complainant's cotton was part of the cotton that was sold at Nashville.

In a word, complainant utterly failed to prove five out of seven of the "circumstances" upon which he relied to prove the ultimate fact, viz, that the proceeds of *his* cotton were paid into the Treasury of the United States.

Suppose, however, that complainant had succeeded in proving:

(1) That he owned 31 bales of cotton in a certain warehouse in Rome in May, 1864.

(2) That on May 18 Rome was captured by the Government forces.

(3) That *his* cotton (not merely some cotton) was removed in Government wagons to a warehouse adjoining the railroad, which was then in the Government's possession.

(4) That afterwards *his* cotton (not merely some cotton) was carried over said military railroad to the quartermaster at Kingston.

(5) That *his* cotton (not merely some cotton) was forwarded by said quartermaster to Chattanooga.

(6) That *his* cotton (not merely some cotton) was shipped from Chattanooga to Nashville, and there turned over to the Treasury agent, by whom it was sold.

There is nothing in the opinion in the Ross case which even intimates that the Court of Claims could not infer as a matter of *fact* that the Treasury agent did his duty, and paid the proceeds into the Treasury.

On the contrary, this court fully recognized in that case the rule that "officers are presumed to have done their duty." (92 U. S., 284.)

There is nothing in the opinion of the court in that case overruling the case of *United States* v. *Crussell* (14 Wall., 4), which was decided on the presumption that officers of the Government perform their duty.

IV.

Petitioner's counsel, on page 81 of their brief, quote the following sentence from the opinion of this court, in the case of *Lilienthal's Tobacco* v. *United States* (97 U. S., 266):

> In criminal cases the true rule is that the burden of proof *never shifts;* that in all cases, before a conviction can be had, the jury must be satisfied, from the evidence, beyond a reasonable doubt, *of the affirmative of the issue* presented in the accusation, *that the defendant is guilty* in the manner and form as charged in the indictment.

The Lilienthal Case refers to the case of the *Commonwealth* v. *McKie* (1 Gray, p. 64), which latter case explains what is meant by the expression that in criminal cases "the burden of proof never shifts."

The explanation is, that in an indictment for an assault and battery, the State must prove, not only that the battery was committed, but also that there was no legal justification for it; while in a civil action of trespass for the same assault and battery, if the plaintiff proves the assault and battery, the burden is shifted to the defendant to prove self-defense. (See 1 Gray, pp. 64, 65.)

In a criminal case justification or the absence of it, may be shown under the general issue; and as the burden of proof on the general issue in a criminal case is on the State throughout, of course it never shifts to the defendant.

In a civil action of trespass neither justification nor the absence of it can be shown under the general issue. In such an action justification must be specially pleaded. And when pleaded, it admits the trespass and assumes the burden of justifying it.

As said by this court in the Lilienthal Case, "*the affirmative of the issue* presented in the accusation" in a criminal case is "*that the defendant is guilty* in the manner and form as charged in the indictment."

The *ultimate* fact to be established by the State is "that the defendant is guilty;" and the burden of proving that *ultimate* fact "never shifts" from the State to the defendant.

But in most criminal cases the *ultimate* fact of guilt can be proven only by a resort to circumstantial evidence.

Circumstantial evidence consists of certain *probative* facts, the proof of which establishes the *ultimate* fact of guilt.

While the burden of proof never shifts as to the *ultimate* fact of guilt, it frequently shifts as to the *probative* facts relied upon to establish the *ultimate* fact.

To hold that the burden of proof never shifts as to the *probative* facts in a criminal case would be to hold *that circumstantial evidence can not be used at all in criminal cases.*

In an indictment for murder the *ultimate* fact to be proved by the State is that the defendant is guilty of that offense.

In order to constitute murder, the homicide must have been done with malice; and therefore malice is one of the *probative* facts to be established in the case.

The State proves that the homicide was voluntary and without excuse or justification. The law presumes the existence of the *probative* fact of malice; and the burden is shifted to the defendant to show the want of malice. (9 Metcalf (Mass.), 121, *Commonwealth* v. *York.*)

Another illustration of the shifting of the burden of proof as to the *probative* facts in criminal cases is given in Reynolds's Stephens on Evidence, third edition, article 95, page 142.

> A., a married woman, is accused of theft and pleads not guilty. The burden of proof is on the prosecution. She is shown to have been in possession of the stolen goods soon after the theft. The burden of proof is shifted to A. She shows that she stole them in the presence of her husband. The burden

of proving that she was not coerced by him is shifted on the prosecutor.

It will be seen that when it is said that the burden of proof never shifts in criminal cases, all that is meant is that the burden of proving the *ultimate* fact of *guilt* does not shift, but remains on the Government throughout. But as to the proof of the various *probative* facts which it may be necessary for the Government to establish in any particular case, the Government may establish each and all of them by proof of certain circumstances; and when such circumstances are proven, the jury may draw from them inferences of fact as to the existence or nonexistence of the particular *probative* fact to which they relate. Nothing said by this court in the Lilienthal case was intended to abolish the use of circumstantial evidence in criminal cases.

In the case at bar the *ultimate* fact to be proven by the Government was *that the defendant is guilty* in the manner and form as charged in the indictment; and as to that *ultimate* fact the burden never shifted.

But one of the *probative* facts to be established was that defendant had knowledge of the state of the account.

The Government proved that the defendant was president of the bank and certified the checks voluntarily. The court told the jury that it was the defendant's duty, before certifying the checks, to inform himself of the state of the account, and from the existence of such a duty the jury might draw an inference of fact that he did so inform himself. In other words, the court said that the jury might infer the *probative* fact of *knowledge* from

the defendant's duty to know; but it did not say that the jury might infer the *ultimate* fact of *guilt*.

Counsel for petitioner, on page 81 of their brief, quote this sentence from the opinion of the court in *Agnew* v. *United States* (165 U. S., pp. 49–50):

> Undoubtedly, in criminal cases the burden of *establishing guilt* rests on the prosecution from the beginning to the end of the trial.

But counsel failed to quote the next succeeding sentence in the opinion, which is as follows:

> But when a prima facie case has been made out, as conviction follows unless it be rebutted, *the necessity of adducing evidence then devolves on the accused.* (165 U. S., p. 50.)

V.

Petitioner's counsel, on page 74 of their brief, say:

> It does not seem to have occurred to the court that it was as much the legal duty of defendant not to certify a check when funds were wanting as it was to know the funds were on hand when he did certify; *and the novel process of presuming the performance of one duty to convict a man of crime in the violation of another does not seem to have attracted its notice.*

Again, on page 79 of their brief, they say:

> Is it to be inferred or presumed that the defendant performed his duty under the by-laws of the bank in order to predicate the conclusion that he violated his duty under a statute of the United States and committed an infamous crime, etc.?

Their contention is, in effect, that defendant was deprived of the benefit of a presumption of law which

obtained in his favor, while he was subjected to a presumption of fact which obtained against him; whereas the one presumption ought to have neutralized and nullified the other.

We concede that the defendant was fully entitled to the benefit of the presumption that he did his duty "not to certify a check when funds were wanting," but we contend that he received the full benefit of that presumption in the following portion of the charge of the court to the jury, which was given at defendants request:

> The *law* presumes the defendant to be innocent, and this presumption stands as an all-sufficient witness in his favor, until the Government establishes his guilt by competent proof to your satisfaction beyond a reasonable doubt. (See printed record, p. 124.)

As to the other presumption, or inference, viz, that defendant discharged his duty in regard to informing himself as to the condition of the account before certifying the checks, the court merely told the jury that they might, if they saw proper, draw an inference of fact that he did so inform himself, but that the defendant might show (i. e., by a mere preponderance of proof) that he did not in fact acquire information of the truth. It will be seen that so far as the presumption in favor of the defendant was concerned, it was given all the potency of a presumption of *law;* while as to the presumption or inference in favor of the Government, with reference to the *probative* fact of knowledge, it was left discretionary with the jury whether they would give it even the potency of an "inference of fact," i. e, of a mere argument.

It will also be seen that while the Government was required to overturn the presumption in favor of the defendant by proof beyond a reasonable doubt, the defendant was allowed to overturn the inference of fact (if the jury saw proper to draw it) by a mere preponderance of testimony.

VI.

Petitioner's counsel, on page 79 of their brief, use this language:

> It is a rule of law, and of common sense as well, that opposing presumptions, like opposing estoppels, *neutralize and nullify each other and leave the matter at large.* (*Ricard* v. *Williams*, 7 Wheat., 59.)

By reference to the case of *Ricard* v. *Williams* it will be seen that this court did *not* say that "opposing presumptions neutralize and nullify each other and leave the matter at large." On the contrary, the court said that presumptions "may be encountered and rebutted by contrary presumptions." (See 7 Wheat., p. 109.)

In the case at bar, the court gave the defendant the full benefit of the presumption that he did not "willfully certify a check when funds were wanting;" and all the court did was to allow the presumption to be "encountered and rebutted," so far as the *probative* fact of knowledge was concerned by the contrary inference *of fact* "that he did his duty and informed himself of the state of the account." The court allowed the inference to operate only toward the establishment of the *probative* fact of knowledge.

The court still left upon the Government the burden of proving the "bad intent," which is the other essential of "willful."

VII.

Counsel for petitioner, on pages 13, 14 of their brief, refer to certain cases in 20 Vt., 21 Vt., and 12 Vt., on the question as to the defendant's right to introduce evidence in support of his character.

In the case of *Stephenson* v. *Gunning* (64 Vt., 609) the earlier Vermont cases are reviewed, and the practice as followed by the trial court in the case at bar is approved.

Respectfully submitted.

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